

1951

Angus H. Bishop v. Duck Creek Irrigation Co. et al :
Brief of Duck Creek Irrigation Company, a
Corporation, Appellant Herein

Utah Supreme Court

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**In the Supreme Court of the
State of Utah**

FILED

AUG 27 1951

ANGUS H. BISHOP,

Plaintiff and Respondent

vs.

DUCK CREEK IRRIGATION COMPANY, a corporation (Appellant); BENJAMIN DRAINAGE DISTRICT, a corporation; KENNETH DIXON; CARL LINDSTROM; LEO STEELE; LAVON PAYNE; RULON CREER and JOHN B. JONES, Defendants.

DUCK CREEK IRRIGATION COMPANY, a corporation,

Cross-Complainant and Counter Claimant,
vs.

BENJAMIN DRAINAGE DISTRICT, a corporation; KENNETH DIXON, CARL LINDSTROM; LEO STEELE; LAVON PAYNE; RULON CREER; and JOHN B. JONES, and ANGUS H. BISHOP,

Cross Defendants.

**NO.
7660**

**Brief of Duck Creek Irrigation Company, a
Corporation, Appellant Herein**

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In the Supreme Court of the State of Utah

ANGUS H. BIHSOP,

Plaintiff and Respondent,
vs.

DUCK CREEK IRRIGATION COMPANY, a corporation (Appellant); BENJAMIN DRAINAGE DISTRICT, a corporation; KENNETH DIXON; CARL LINDSTROM; LEO STEELE; LAVON PAYNE; RULON CREER and JOHN B. JONES,
Defendants.

DUCK CREEK IRRIGATION COMPANY, a corporation,

Cross-Complainant and Counter Claimant,
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BENJAMIN DRAINAGE DISTRICT, a corporation; KENNETH DIXON, CARL LINDSTROM; LEO STEELE; LAVON PAYNE; RULON CREER; and JOHN B. JONES, and ANGUS H. BISHOP,

Cross Defendants.

NO.
7660

APPELLANT'S BRIEF

STATEMENT OF THE CASE

This is an action for an injunction and to quiet title to claimed water rights originally brought by plaintiff, Angus H. Bishop, against the Duck Creek Irrigation Company,

a corporation. Duck Creek Irrigation Company counter-claimed for the purpose of quieting its title to water rights as against the plaintiff. Other parties were brought into the action upon the Trial court's own motion, and Duck Creek Irrigation Company cross-complained as against them.

Of the new parties, Benjamin Drainage District, Kenneth Dixon and Leo Steele defaulted; John B. Jones disclaimed; the other new parties have not appealed. This appeal, therefore, involves a contest between the two original parties, Angus H. Bishop, Plaintiff, and Duck Creek Irrigation Company, Defendant.

Duck Creek Irrigation Company appeals to this Court from that part of the trial court's decree which awarded to plaintiff any water rights, or rights of way, from Duck Creek, and which failed to award to said company as a first and primary right in the waters of Duck Creek as against plaintiff, at least eight cubic feet of water per second, and which limited the defendant company's first and primary right to two cubic feet of water per second.

References to pages of the court file will be prefixed with the letter "R", and to the transcript with the letter "T". The plaintiff-respondent will be referred to generally as "plaintiff" and the Duck Creek Irrigation Company as such, or as "defendant company."

STATEMENT OF FACTS

Duck Creek, which is also known as Benjamin Slough, and as Beer Creek, is a natural stream fed by rain, snow, springs and seeps, as well as by artificial drains and waste water from the surrounding areas. It has its source in or near the Wasatch Mountains near the Town of Salem, east

of the City of Payson, Utah County, Utah, and flows in a northwesterly direction through the Town of Benjamin and into the waste-lands adjacent to Utah Lake. In the flood-water season, such of its waters as are not diverted above find their way into the lake (R 188; T 356-357, 469).

The volume of water in Duck Creek varies greatly from season to season and from year to year. At times in the early Spring and immediately following heavy rains, the flow of the creek often exceeds twenty-eight second feet and sometimes rises to an estimated one hundred second feet. In late summer, its flow decreases to two or three second feet and in especially dry years, sometimes nearly ceases (R 188; T 375-376, 455-466; see also the testimony cited in detail below).

The residents of the agricultural community of Benjamin, through which the creek runs, irrigate their farms from this source. As far back as the Eighteen-Sixties, the predecessors in interest of the defendant company, original settlers, began using these waters for irrigation and it is apparent that the economy of the community ever since has been, and now is, dependent upon this supply (T 356-375, 513, 590-631, 645-647).

In 1917 the Duck Creek Irrigation Company was organized, to which the users transferred their water rights, and which, ever since, has distributed the waters from the two Duck Creek dams established by the original users (T 625-632). The predecessors in interest of plaintiff owned flat meadow, greasewood and waste-land below the lands of the stockholders of the defendant company. In the early days, during the run-off season when Duck Creek was high, the entire area would sometimes be inundated (T 381-382). No attempt was made to irrigate, and the problem was

largely one of getting rid of the water (T 92, 470-471, 479, 490, 573, 578, 622-624). Later Stevens began to make some use of the waste water (T 685-686). Stevens built a dam to catch surplus water coming down the Duck Creek channel in the Spring after the flood-waters had decreased, which is the Stevens Dam hereinafter referred to (T 18-19, 77-78, 82-84, 381-382, 369, 460, 471-472, 490-491). This dam also diverted waters coming from a spring area to the South which entered the channel below the dams in which the defendant company was interested (T 85-87, 88, 485-486).

There were four claimed diversions from Duck Creek, which were involved in the action ; the first one in position on the stream was claimed by the defendant, Rulon Creer. He was awarded by the court only the right to have the water flow through his land as it had theretofore done (R 206). He has taken no appeal and there is now no issue in the case respecting his rights.

The next highest was one asserted by John B. Jones. After the court ordered him brought into the case, he disclaimed any interest in the water. Both of the above mentioned diversions were above the lands of the other parties.

The highest diversion involved in the present appeal is the Upper Duck Creek Dam. This dam is in the east part of Benjamin. It was built prior to 1870 (T 371) by the predecessors in interest of the Duck Creek Irrigation Company and was always considered to have the first and primary right on the stream. Plaintiffs' counsel during the trial conceded that plaintiff claimed no rights to, or from, this Upper Dam or in the ditches leading therefrom (T 20-21). It is referred to in the record as the Upper

Duck Creek Dam, or the Upper Dam, and will be called herein by the latter term.

The next diversion, about a mile downstream, is the Duck Creek Dam proper, or Lower Duck Creek Dam. Since this dam involves the only diversion point in which both the plaintiff and the defendant company claim an interest, and since it will be mentioned herein most frequently, it will be termed the Duck Creek Dam in this brief.

The lowest diversion mentioned in the record is a concrete dam built by Ray Stevens, predecessor in interest of plaintiff, after 1906 (T 18). There was presumably some other kind of dam or obstruction there prior to this, but the record is not clear on this point. It is below the lands of the stockholders of the Duck Creek Irrigation Company, and will be referred to as the Stevens Dam.

Defendant's exhibit three shows the general course of Duck Creek and the relative locations of the three dams last above-mentioned. Defendant's exhibits X-9 and X-11 are views from the air of the lower reaches of Duck Creek. The area shown in the foreground indicates the type of land on which plaintiff claims his water right was acquired, consisting largely of meadow, greasewood and waste-land. The cultivated and populated area shown in the central and upper portions of these pictures suggests the kind of land on which the stockholders of Duck Creek Irrigation Company acquired their rights. Plaintiff's land is shown more clearly by defendant's exhibit X-4.

Plaintiff sought to establish his water right largely upon the testimony of Ray Stevens, who became interested in the land now owned by plaintiff in 1906 and who did not pretend to know the situation existing prior to that year. He used excess water which flowed over the Duck Creek

Dam down to the Stevens Dam and also used through the Stevens diversion water which entered the creek below the Duck Creek Dam from the "Big Springs" area to the South, which averaged about two second feet, but during wet seasons increased greatly in quantity (T 85-87, 88).

At this point we state our position as to the ultimate facts shown by the evidence hereinafter cited, so that the Court can read our detailed statement of fact with that position in view.

The evidence adduced by the Duck Creek Irrigation Company showed that its predecessors put in both the Upper Dam and the Duck Creek Dam before 1870; that when the water got low, the Upper Dam would generally take all the water, the Lower Dam taking whatever entered the creek below; that through both dams all of the waters of Duck Creek were taken by the predecessors in interest of the defendant company to the full capacity of their ditches, being between four and ten second feet each, and even then, there was insufficient water for their needs; that when the defendant company was organized in 1917, it took over and regulated the entire stream, putting the users on turns; that plaintiff's predecessors at no time claimed any water against Duck Creek stockholders until shortly before the commencement of this lawsuit; that when the water was so high that the stockholders of the company could not use all of it, some passed over the Duck Creek Dam, and on a few occasions, Stevens came to stockholders and asked permission to run excess or high water through a ditch from the Duck Creek Dam, but whenever the stockholders needed to use the water, they would cut him off without protest or objection on his part.

The transcript is extensive. But it is surprising how

little real conflict there is in the essential facts. There was some confusion in the record as to the acreage on which Stevens claimed he used water, arising from his repetition of his alleged use of water on particular lands as hereinafter noted, and his attempt to cumulate a total acreage by adding the area he claimed he irrigated in 1938 or 1939 to areas he claimed he irrigated theretofore. However, despite such confusion, it clearly appears that the area he claimed to have irrigated was a total of one hundred acres of pasture from the Stevens Dam and thirty acres of grain from the Duck Creek Dam (T 21, 65-66).

This would have been immaterial even though his claims had been greater, because his use originated in 1906 or thereafter, and was always from surplus water beyond the needs of the defendant company or its predecessors and such use was always made by him in recognition of Duck Creek's prior rights as the record hereinafter cited abundantly shows. The ultimate facts involve no real dispute in the record and show conclusively that the defendant company was entitled to an award of at least eight second feet of primary water from Duck Creek without pro-rata, together with the high water right of at least the quantity the court awarded; that prior to 1903, no appropriation of any water by the predecessors of the plaintiff was shown, and that after 1903 no valid acquisition of any right is even suggested in favor of the plaintiff, the use by Stevens of water from the Duck Creek Dam being simply a permissive use of high or surplus water beyond the needs of the defendant company and its predecessors (T 78, 81, 86, 91, 92, 103, 159, 527-538, 554-555, 636, 700). Moreover, the record further shows that below the Duck Creek Dam, there are waters from the Big Spring area entering

the creek and available at the Stevens Dam, averaging about two second feet throughout the year, with a substantially larger flow in the Spring, which is more than enough to take care of the one hundred acres of pasture land Stevens claimed he watered out of the Stevens Dam (T 85-87, 88, 472-474, 480-481, 488, 490-491).

On these and related points we cite the record more in detail below so that there can be no possibility of a repetition of the lower court's error. The case was under consideration in the lower court for some four years. The record was too voluminous to keep in mind and the lower court, we believe, confused mere claims to water rights for the rights themselves. So that the facts themselves will meet plaintiff's claims before this Court, we cite in detail the record on which we rely:

Edward R. Stevens

Edward R. Stevens appeared as the first witness for the plaintiff. He testified that he had been acquainted with plaintiff's land for forty or fifty years. He owned a part of this land from 1906 to 19~~74~~⁴, and in the year of 19~~74~~⁴, he sold it to one Cottam. He testified that he, himself, after 1906, put in a concrete dam at the point referred to as the Stevens Dam (T 19). He testified that waste water was diverted from the Stevens Dam (T 23). He testified in general that about one hundred acres of grass or wild hay land was irrigated from this dam, all of the land lying west and north of that dam (T 21). He then said he could irrigate one hundred acres which he bought from one Wilson and that he had irrigated it since 1938 or 1937 (T 56). (Whatever acreage he claimed was irrigated from the Stevens Dam could more than be taken care of by his water

from the Big Springs area, entering the creek below the Duck Creek Dam, and from excess water beyond the capacity of the defendant company's diversions, and as we shall further point out hereafter, his testimony makes it clear that the only water he used that passed the Duck Creek Dam was that which was in excess of the needs of the upper users and which they voluntarily permitted, during high water, to flow down).

Stevens also claimed that subsequent to 1906, he used water out of the Duck Creek Dam through the old Stewart Ditch, and he sought to identify various tracts of land included in colored portions on plaintiff's Exhibit A as land on which he used water from the Duck Creek Dam. The coloring on plaintiff's exhibit A is somewhat misleading, since even Stevens did not claim he used water on all the colored portions or even the major part of them; on the contrary, his testimony, taken in the light most favorable to plaintiff, showed that during some years he watered from high water various acreages without continuity or without showing whether such acreages were watered from year to year or only occasionally when high water was available. Thus, he testified that only one-half of the forty-seven acres shown in green on plaintiff's exhibit A was watered through the Stewart Ditch from the Duck Creek Dam (T 22, 27, 50). He added, however, that he "can't say anybody irrigated that before 1906." He "presumed Stewart did it, but I couldn't say whether he did or not" (T 22). Wild hay was raised by Stevens (T 23). He indicated that wild hay would grow there without irrigation, "but not very high" (T 23).

Mr. Stevens also claimed to have used water on a part of the north portion marked in red on exhibit A, beginning

with 1906. He only claimed that he watered of the red portion "100 acres in the patch of greasewoods" (T 24). He then gave the breakdown on the red portion of thirty or forty acres and twenty acres, and "eight acres or seventy five" (T 29). Presumably, the mention of seventy-five was the total from the red. Later he indicated from the Stewart Ditch he watered about thirty acres in the red (T 52). Then he raised the amount to somewhere around forty acres (T 53). He did not indicate when he did this, except that it was after 1906, was not revealed (T 65). said he irrigated thirty acres from the second ditch, or what he called the old Stewart Ditch (T 54).

The only grain he claimed he ever irrigated from Duck Creek Dam was thirty acres. How many years or when, except that it was after 1906, was not revealed (T 65). All he could say was that he had thirty acres of grain "some years", and the rest in meadow (T 65-66).

Plaintiff claimed nothing whatsoever in the Upper Dam (T 21).

Mr. Stevens further testified that Cottam in turn sold the land to Mr. Bishop (T 6).. He stated that there was a lower dam marked on the map (Stevens Dam) and that he had put in that concrete dam (T 18). It was to irrigate part of Stevens' land which he sold to Mr. Bishop, and he said that about one hundred acres was irrigated out of the lower ditch (T 19).

Mr. Stevens testified that there was about one hundred acres irrigated from the Stevens Dam, all of the land lying west and north from the Stevens Dam (T 21). He couldn't say that anybody irrigated that before, but he watered down there every year from the year 1906. He said he presumed Stewart watered before, but couldn't

say whether or not he did. When Stevens first acquired the land in 1906, all of those (indicating map) ditches were there, all but one ditch and that has been changed since and that one here has been straightened out like this (T 22). (See also Stevens' testimony cited hereafter.)

Stevens testified that he put about thirty acres of grain in the northeast corner of the red portion of the map. That was all the grain he claimed to have irrigated out of the Duck Creek Dam. That covers the entire period between 1906 and 1942 in this particular ditch and that is all he irrigated from Duck Creek Dam. That is about thirty acres, he imagined (T 65).

On cross-examination, Stevens testified in substance further: That Duck Creek Dam from June first on is practically a tight dam—from then until about July. It depends entirely on the nature of the year. Whenever the water gets low, Duck Creek Dam is a tight dam (T 77). It has been a tight dam ever since he had been there. He didn't have anything to do with making either one of these dams, first a fresh manure dam and then a concrete dam. He didn't go up there and make diversions himself. If there was a lot of water in the stream, he sometimes got it to July first and if it got low, he was cut off quickly; there would be some in the stream but he could not get it (T 78).

He knew the Duck Creek people had had turns since 1917. He interfered with the water in 1922 when Ashworth was living on the Stewart Ranch; Ashworth got quite cocky and said Stevens didn't have any water and he went up to the Duck Creek Dam and pulled some flash boards out and turned it into Stevens Dam (T 79). Stevens turned it down probably in 1927. He pulled some of the

boards out and they were probably put back by somebody. The same thing happened in 1922 and when they were taken out somebody put them back and he didn't say anything more about it (T 800). Stevens didn't go up to see what the condition of the dam was and he didn't know whether it was a tight dam or not, not exactly. He never went up to see whether it was leaking or not, if it leaked, he got it down there. He didn't go and put a dam in Duck Creek and never did at any time in his life (T 81).

Whenever the water came down in high water or low, the original dam of brush and manure was there (T 82). Prior to putting in the drainage, the whole country down there was pretty wet. Even then, Stevens put the water on the grass to make the hay (T 83). For the water that he used down at the Stevens Dam, he depended largely after June first on the seepage water that runs into Duck Creek below the Duck Creek Dam (T 84). This is because the Duck Creek Dam is tight. Any water that comes down here, comes in by drainage and that is what happened after June first. What he called the Meadow Ditch when he first went there came from the South across Duck Creek. It came out of the Big Spring somewhere in the Southwest Quarter of Section 32 (T 85). If there wasn't plenty of water, he quit when the high water quit (T 86).

The stream from the South (Big Spring area) was put in Duck Creek and came down to the Stevens dam in about 1928 or '29. It was one and a half to two second feet and runs quite steady all summer. That is the water used for low water for part of the land in black and most in green on plaintiff's exhibit C. There is one spring off to the South of the Big Spring and another spring called the

"Reese Spring"—they were two that flowed into that particular stream, besides some of the high water and water that comes through there from the fields down by the Peet-neet Creek, or the Payson Creek. When the ditch was changed, he made no arrangement with the people using part of this stream from the South, he just took it (T 87). These people discontinued to use it and they never kept up the flume and it went into a slough below the Duck Creek Dam. The water dumped into the creek and came down onto the Stevens Dam. There was possibly twice the amount of water in the early Spring because the high water would come down through here just like it does through the slough. How long it ran a stream of about three second feet would depend upon how stormy it was and when the people on the Payson Creek were using the water (T 88).

The Reese Spring and the Big Spring would run about two (2) second feet the year round. Stevens had the slough use of the water until he left there, since 1928 and 1929 (T 88).

He admitted that from the year 1906 until 1942, he never made a single claim that the company should open the Duck Creek Dam and he never objected to them closing the gate. He never put the dam in once entirely. He put in some flashboards after it was built up—that was always in the early Spring. The situation is that in the early Spring when the snows are melting in the valley, there is a great deal of water and it comes down pouring as much as twenty-five or thirty second feet, or forty second feet (T 89).

Before the drainage district put in its drain in low water some years the water was very low and it would go

down as low as probably two second feet or less than that. He never attempted to use any of the water when it got down that low. He knew that the Duck Creek Irrigation Company was using what they could whenever they could get it and they used it each and every year that he was down there (T 90). Practically all of the time in the low water season, they used all of that water, what little there was, and that was from 1906 until he sold the property. After they developed the drain water he said he claimed some of the lower water right because he helped to put up the drainage system. He said he used some down there but he didn't know whether Duck Creek could use it or not, most of the time this was in the Spring. He said it was probably right that when they couldn't use it they would let him use some of it (T 91).

After they put in the lower drain in his country, he said it was a disadvantage to him because they pulled the water out of that country so he needed more water and he needed low water to get by, but before the drain was made, he said he got by with a high water right because he needed only one irrigation for awhile, possibly two for that ground and it may have been so wet that any more water there would have been ruinous (T 92). He bought Strawberry Reservoir water because he said he didn't have enough water to water his grain; he got twenty acre feet; he had about thirty acres to irrigate (T 93). This was the same thirty acres of grain he claimed to have used Duck Creek water on. When there was a lot of water in Duck Creek he said he watered the first time on that grain in the red from Duck Creek and then the next water he had to get from Strawberry to finish the ground. He said the first water from Strawberry would come about June fif-

teenth or probably the first of July; the last water he claimed to have gotten from Duck Creek would be around the first of June (T 94). He said he would start irrigating with that until along about the first of June (T 95).

The Strawberry water came in 1916, ten years after he arrived there (T 95). He got about twenty acre feet and from that time on, he was able to grow some grain on that corner (T 96). He said a lot of Strawberry water would come down when the fellows couldn't use it and that was the thing that helped him put across his crops. The Strawberry water had a little better fall than the Duck Creek stream (T 98).

Stevens' judgment was that the available flow at the Duck Creek Dam along the first part of May would be from ten to twenty second feet and that it would go down to five second feet about the fifth of June (T 102).

He knew all the time that he was irrigating down in the territory marked by colors, that there was another diversion out of Duck Creek at the so-called Upper Dam (T 102). He knew that prior to the incorporation of the Duck Creek Irrigation Company, they were using water there and some of them were using it in rotation. When he went there in 1906, he didn't investigate the Upper Dam or the users about their right. He knew that they were taking out water and in rotation from the Duck Creek Dam when the water got low and he never asked for a turn at any time from these people and he never made any protest that they were handling it in that way (T 103).

When Stevens moved to the property in 1906, there was a brush-manure dam at the Duck Creek site as he remembered. He had nothing to do with putting it there (T 109). He didn't help put in the concrete dam and was

not asked to. He didn't know it was put in at the time but discovered it the next summer (T 110). When he got the Strawberry water in 1917, he began to grow some grain (on the greasewood land)—a little bit. He was the man who put it under cultivation (T 117).

Prior to his buying the land in 1906, Stevens visited the land but his visits were casual and he wasn't looking for anything in particular and didn't have any water right in mind. He wouldn't say that things might not have been different from what he testified to (T 121).

Mr. Stevens is sixty years old (T 122).

The rectangular piece in red on exhibit C was a natural meadow when he went there (T 123). A large block of land immediately north of the rectangular piece was principally in greasewood except the piece that he was able to put in, in the northwest corner and there hasn't been anything done to cultivate it (T 124).

Stevens further testified that Stewart had a ditch that brings in water from the meadow (Big Springs area) over into this territory. He used the water from the Big Spring and the other springs from the time Stevens went there in 1906 until 1928 when the flume was burned out. They made no effort to repair the flume. Since then, the water has run into Duck Creek and Stevens has picked it up at the Stevens Dam (T 154). This, as pointed out above, is water entering below Duck Creek Dam.

Mr. Woodward came at one time to Stevens and told him that they wouldn't let him have any water and he argued with Stevens that he didn't have any right down there. Stevens didn't go to the Duck Creek people about that and he understood that they were the ones that were stopping Woodward (T 155). He didn't do anything about

it. At that time he owned the property and had leased it to Woodward (T 156). He knew that the other users on Duck Creek over the years from the time he went there in 1906 had been using the water at all times out of Duck Creek—practically, yes (T 157). He knew there was a dam there in 1906; he knew by reputation that the upper users at Upper Duck Creek had all the water and the lower users at Duck Creek Dam were having trouble about that. He knew this by reputation—it was being talked about (T 158). He never made any complaint to the people in the the upper ditches that they were using the water. He never complained to the upper users and he knew all the time that they were taking the water, but he didn't know how much. He would like to have had some water but he didn't bother to go up and get it. He didn't interfere with it. Prior to that time, he didn't assert any rights to the stream from the Upper Dam even when they took all of the water (T 159). When he was up there watering in the Spring of the year, the stream would probably be about twenty-five or thirty second feet. He would take ten (T 160).

Whenever there is a heavy rain, the people that have the grain and beets in and crops like that, don't want the water and they turn it down the slough and Stevens said he could always use it any time on his meadow regardless of when it was (T 744). He didn't remember of mentioning about prior rights, or of anybody having a better right than he had or anything else about it at the time he talked to Tucker and helped him clean the ditch (T 779).

“Q. Now, have you a judgment of how much of that portion is in greasewoods now?”

A. Well, it all depends on what you call greasewoods—

Q. Where greasewoods grow?

A. I can't say definitely, but I will say this: that there are several large, big swales in there where the grass grows up to the cattle bellies, and on this part over here I broke up twenty to twenty-five acres and we usually raise grain on it I would say offhand that there is probably eighty acres that is what you would really call greasewood (T 781) Around 1921 or 1922, Mr. Ashworth came onto the place. I ran the water around here in this ditch and into this Strawberry Ditch (T 784) I hauled some manure on my wagon and put in a dam in my ditch so that when I turned the water down, the ditch here, it wouldn't wash the dam out and flood out on Clay Ashworth's beets (T 786)."

None of the greasewood area has been plowed except a little space over in the northwest corner. It was about 1925 when Stevens cleared that (T 795).

Robert L. Wilson

Robert L. Wilson was called as a witness for the plaintiff. He made a survey for the plaintiff in August, 1943 (T 30). He testified that all of the ditches on his map (plaintiff's exhibit A) appeared to be old ditches (T 32). Prior to the time he made the survey, he didn't think he observed the ditches (T 34). He hadn't the slightest idea how much water was needed to irrigate lands like these lands (T 36).

Stevens told him he was having the survey made so he could make a filing with the State Engineer and that was in 1943 (T 40). The whole contour of the country in this vicinity is practically level (T 42).

William Betts

He was seventy-two years old. In 1886, he went to work for Orange Warren (T 177) who was then living on the H. A. Stewart ranch. He was then in his twelfth year. He worked for Mr. Stewart until August 31st, 1887 (T 178). At that time, there was a considerable stream coming down and they used to call it "Beer Creek" which is known, he believed, as "Benjamin Slough." There was one dam that used to be called "Richardson Dam", that was on the east side of the highway and there was another dam farther down and they called that the "Stewart Dam", and he believed it is called the "Duck Creek Dam". These were the Upper Dam and Duck Creek Dam, respectively. He had not been there for years. There was a dam put in, four posts, and upstream, and a little farther back, and there was a heavy timber put across the upper post and down toward the bottom of the creek and then two above. The water raised and went in a northwest direction and flowed down straight west (T 179-170).

He saw the water used on a piece of ground belonging to Andrew J. Stewart, Jr. It was just west of the Jackson Stewart home. He had some oats in the ground and then he irrigated the ground so he could plant some potatoes. That was the first irrigation he remembered on that piece of ground. It ran farther west—about eighty acres or better. There was a piece of ground where the water emptied into what was called the "calf pasture" (T 180). The creek runs straight west between the old Stewart barn and the home there. He judged it ran about eighty rods farther west (T 181).

The Richardson Dam was on the east side of the highway; it would be farther east than anything shown on the

map (plaintiff's exhibit A), that is, the Upper Dam or Duck Creek Dam (T 185).

Bert O. Wignall

Mr. Wignall was a little over twelve when he lived in the territory in question. He was 53 years old at the time of the trial. He didn't know very much about what point they diverted water from the Benjamin Slough (T 190).

They called the old Jack Stewart west ditch the one directly west of the house; he called Stewart Ditch No. 2 the west ditch. In the Spring of the year, pretty near always he saw water running in there and sometimes up until May and June (T 191).

“Q. Do you recall how late you recall seeing water down on this property, how late in the Spring?

A. Well, in the Spring of the year, I would say until about the fifteenth of June, and a lot of times, it was flooded by somebody watering up there. It couldn't have got in there only coming through these ditches. I don't understand it, either the waste ditch or the Duck Creek, as you call it.” (T 194-195).

When they have big streams, they have water down there in the territory where Mr. Stevens had his ranch. The drain ditch or waste ditch he referred to was a big wide drain ditch to drain the country. He never was there to see it drained out (T 196). He never remembered of meeting a man in the vicinity of plaintiff's property west of the fence, tending the water, and he was down there a good many times. His judgment as to whether they ever irrigated wouldn't be very good, he said, because if he didn't see anybody, he wouldn't want to judge it. This would be in the Spring of the year, but sometimes in the

middle of the Summer, waste water would run off from the old place and come down through there. He called it the waste ditch (T 197). That was because it was used to run waste water down there and it was always referred to as the waste ditch. His home was farther west than the Stevens property. They lived there from 1904 to 1918 (T 198).

George E. Wilson

Mr. Wilson was seventy years old (T 200). He bought a ranch west of the Stewart ranch in about 1919 and tended it for about four years. It was in the vicinity of the land on the map (T 201) (Plaintiff's exhibit A). There was no drain when he first went there. There was a ditch across the north part of the block. That was the south end of his ground. There was water placed upon the lands adjoining his lands to the south and the east and this was until approximately the first of June (T 202). He never took the trouble to go up east or south or any other direction to see where the water came from. I didn't know where the water came from. He didn't observe the ditch through which the water came (T 203).

He never actually went up to the Duck Creek Dam to see where the water was coming from. He hadn't seen the dam in the summer. He didn't have anything to bother there (T 204).

Howard Stevens

Howard Stevens was the son of Ray Stevens; 34 years old and resided at Payson, Utah. He could remember the territory in 1922 or 1921 (T 205). He said that every Spring they had water and that no one ever questioned their rights (T 210). He testified how Duck Creek Water

had been used on this lower land, but could speak only concerning comparatively recent years (T 208-212).

When he went down to help his father in 1924, he was about ten, eight, or ten or twelve years old (T 221). He said he had watered out of Duck Creek until May and June (T 226). They used Strawberry water on the land, too (T 227). They had twenty acre-feet of Strawberry water.

“Q. And you said that many times you would use the water from Duck Creek Dam for two weeks at a time?

A. I have seen it run for two weeks.

Q. I asked for the period of time in June, for the period of time it happened, was it once or twice?

A. Well, I remember principally once in 1929 and in 1928 and it could have been in 1930.” (T 230-231).

The other times, sometimes they would have it for a day and a night and maybe sometimes they would have it for two or three or four days on an average, he would say, about three days—two or three days every year and that happened principally during May and June (T 231). They never took the water when anybody else had it. If the upper people had it, the witness admitted, “We couldn’t have it.” There was only one time that they went and took it from them when they were using it one night (T 233).

The witness didn’t know the upper users were taking turns until 1937; after 1937, Stevens would take the water if the others weren’t using it and any time they started to water the grain, from then on, Stevens didn’t interfere with them if we found they were using it. They started to irri-

gate grain about the middle of May, to the first of June (T 239).

He knew they had a company up above from hearsay. He didn't have any water assigned to him; he never saw a schedule (T 240). He never asked for a ticket directly. He wasn't directly interested in it (T 241).

He never did go up and talk to the men on the Upper Dam about turns; he had no interest in it (T 249). Whenever he took the water out of Duck Creek, the stream was big—generally ten second feet or better (T 250). (Bear in mind that his observation was at the Duck Creek Dam and the defendant company was also diverting water from the Upper Dam.)

LaVere Curtis

Mr. Curtis stated that in the middle of the twenties, as near as he could recall, he worked on the ranch owned by Mr. Stevens west of Benjamin (T 280). The hay that he saw was a pretty good crop and it would have to be irrigated (T 281). The hay they were putting up at that time was native wild grass. As a rule, there was only one crop of wild hay there. They stacked it along in June or July (T 282).

George H. Wilson

Mr. Wilson had been there in the Spring, around 1938 and 1939 every Spring as they took their cattle to the canyon together. He saw water on the Stevens land—on the greasewoods where he was gathering cattle there. That was in 1939 (T 285). That was about the first of June. He didn't think he made an observation more than one time (T 286).

It was when he was getting cattle ready to take them to summer range and he saw water in the swales and over most of the ground there that could be watered (T 286). He didn't see any water come from up the country down to the land (T 287). When he saw water on the ground it was the last of May, he thought. He saw the water once and he rode through the water once and he has been on the place a lot of times (T 288).

Roy Broadbent

Mr. Broadbent testified to matters pertaining to plaintiff's demand for water in 1945, but nothing is touched upon material to the question of the right itself (T 289, 310).

Angus Bishop

Angus Bishop, the plaintiff, testified on his own behalf. He has resided in Payson since October, 1944, and had entered into the agreement with Cottam which has been received in evidence (T 320). He took possession of his land on January 15th, 1945. He had been acquainted with the property only about sixty days prior to that time (T 321). In the first conversation with Mr. Lundell, the latter told him he hadn't any water (T 323).

At a meeting with the Board, Mr. Lundell, one of the defendant company's stockholders, asked plaintiff to state what he wanted. He told him he wanted some water through these ditches and put the same proposition to the Board (T 325). When Mr. Broadbent and the plaintiff went over to Mr. Lundell's home afterwards, plaintiff told Mr. Lundell that he was going to quit playing with him and that he was demanding a stream of water through there on Monday morning and he was going to take it and that

he would clean the ditches on Saturday (T 326). That year, the water was running late, a pretty good stream until the first of June (T 327).

At the present season at the Duck Creek Dam, there has been quite some stream of water running down there steady. When the storms come, the streams fill up sometimes clear to the banks of Duck Creek, about ten feet wide and five or six feet deep (T 328).

Plaintiff didn't know whether the Reese Spring, the Big Spring, drain into Duck Creek (T 330).

There was ten second feet of water when he turned it on his meadow two days before but that is at the Lower Dam. He didn't know what was up there. The only time that he has been up there was when he was with Judge Hansen, Mr. Stevens and Mr. Broadbent (T 332).

When he bought the land, Mr. Stevens didn't tell him at the time that he wasn't in the irrigation company. Later on, he did. Mr. Cottam didn't tell him about the water right before he bought the property. He bought it without looking into the water rights (T 334).

The foregoing is substantially the plaintiff's case on use of the water by the plaintiff and his predecessors, particularly as to whether such use was permissive or out of high water only, or whether it was such as could furnish the basis of a right. There seems no further need to detail the testimony of their witnesses when all of them indicate clearly that the only water ever used was high or excess water, except by permission of defendant company on rare occasions during recent years.

The defendant company produced the following evidence:

J. W. Stewart

Mr. Stewart resided at Gridley, California; he will be 83 years old in September; he has been acquainted with the location of that stream—Slough Creek, or Duck Creek—since he was seven years old (T 356-7). His father was Benjamin F. Stewart.

He was acquainted with the Upper Dam and the Lower Dam in the early days and used to herd cows around them and swim in them, too. Both dams were put in when he came from Payson in 1870. The upper Duck Creek Dam is about sixty rods east of the highway (T 361). It was put there to irrigate the lands west from just below the highway about three-fourths of a mile down toward the lower dam. He remembered of water being taken out of the Upper Dam for irrigation purposes when he was six years old. It was used down as far as the Lower Dam and from there up to within about eighty rods of the Upper Dam (T 362). They irrigated up to the quarter section line that runs down past Ben Stewart's house to the slough. All the lands were irrigated from there to the ranch, from the Upper Dam (T 363). During the time he saw water in the ditches there would be about two second feet in the stream. There was no drainage district then. That would be about May, the first of May or the middle of May—two or three second feet at the Upper Dam. Earlier, he saw the water coming down there more than one hundred second feet—more than ten feet deep and more than twenty feet wide—in February and March (T 364). When the water got down to two or three second feet they would take more of the water out of the Upper Dam. They would "snouge" on the Lower Dam (T 365).

There would be three-fourths of a mile north and south and a mile east and west irrigated in the early days. In the early part of the season they would take out from six to seven second feet in both places—both dams (T 365). They took all the water there whenever they took it out; they took practically all the stream back in the early years when he first became acquainted with it (T 366).

He was there in Sixty-nine or Seventy; there were earth dams; there was about a twelve-inch square flume when they quit irrigating in the summer and the water came down in the winter and it ran around the ends of the Upper Dam and back into the slough (T 367).

Using the water from the Upper Duck Creek Dam in the early days was Shadrack Richardson—Mr. Hickman owns the land now, and the witnesses' brother owned about a ten-acre piece there; his name was Luther J. Stewart and his father owned most of it up there, and R. S. Betts owned some. The witness' father was Benjamin Franklin Stewart, and he irrigated from the Upper Dam. Richard S. Betts owned some of the upper end and a little further north, down there to what they call "Mosquito Hill." Russell Chandler owned a piece in there; Richard Betts owned two pieces, probably twenty acres—sixteen to twenty acres and Jacob Losser owner about twenty acres adjoining where the Ren Stewart farm is and that was irrigated from the Lower Dam (T 368).

He didn't pretend to remember all the land. There were about ten acres west of the section line—that was Andrew Stewart, Jr.'s land (T 370). The witness' brother and himself had about one hundred acres apiece east of the section line between sections thirty-two and thirty-one, more than one hundred acres anyhow (T 371).

That was in 1883, 1884 and 1885. The water from the Lower Dam wasn't as big an amount as the water from the Upper Dam because the upper people had a first right. In the low-water season, the water in Duck Creek was very low—not over two or three second feet and by July, there wasn't any. There just wasn't any water, it didn't come down from above. In May and June there would be two or three second feet of water; in June, it was getting awfully low (T 372). There was not enough water to water half the land; they just had an earth dam across the swale at the Lower Dam. There wasn't any concrete—they never heard of concrete in those days. The land that is called the “Jolley Field” right along the west side of this slough was watered from the Lower Dam and immediately south and west of the Lower Duck Creek Dam, south, only mostly west (T 373).

During the low water season of each year, they took all the water out of both of the Upper Dam and the Lower Dam when they would get to irrigating; he never saw the time when they wouldn't take it all (T 375).

And they used all the water. He saw it, dry. He has seen where the Duck Creek Slough is perfectly dry for a quarter of a mile above the Lower Dam; that would be in the latter part of the season (T376). Some of the water users in the early days who took water out of the Lower Duck Creek were Mon Kerr and Andrew Stewart, Jr. They were the first named. A man by the name of Rosser. They put a dam in, and that was in the low-water season (T 377).

In the Spring when there would be a big stream it would run around the end of this dam and cover all of the land below (T 377). That was below the red and green on

plaintiff's exhibit A. Douglas owned one hundred sixty acres of land and that was covered with water, and that is what made the grass. The people homesteaded it because they could get grass; there were about one hundred acres south of the Douglas land; the Douglas land was just west of the racetrack pasture, that is the east of the large tract in red. He owned ten acres of land in there T 378).

The Douglas land was just west of the racetrack pasture; it joined it on the west and went a half mile west then half a mile south. He didn't have his ten acres under cultivation because there wasn't enough water for it, and he didn't use water on it. It was covered with greasewood (T 379). On the Douglas land, or meadow, he herded cattle. He didn't think they put up any hay but it was a natural meadow and the slough water was spread all over the whole country, and was not confined in any one stream below the two dams. There was no dam in where the Stevens Dam is marked on exhibit A. The land was just flat meadow-land or grass-land except where the racetrack was, and that was greasewood land. The racetrack land was dry and the land to the south was covered with fox-tail all through there in the early days (T 381).

The land was always under water early in the Spring when the floods would come down Duck Creek; they didn't have any dams and no one turned it out in the early days, not as late as perhaps Eighty or Eighty-five; along in there, they began to take care of it and make big ditches and coax it out on the land. The lowest dam was the Duck Creek Dam before 1885 (T 382).

There was a stream coming down out of Payson Canyon and it ran out in the Payson fields and over the meadows and there were springs in there, quite a number (The

Big Springs area). The Pete Winward Spring came down in there; Andy J. Stewart, Jr. took some of the springs out and took them across the slough over into a tract of land just south of the racetrack pasture. He helped Winward to some of that work before he went up into Idaho, and irrigated land from that stream (T 383-384).

A. J. Stewart, Jr. made a ditch across there and fetched the water down from the springs on his land south of the racetrack pasture. No part of that water was taken out of Duck Creek but from the south of Duck Creek and fetched across the Duck Creek on a flume (T 385). He didn't remember of there being a spring anywhere near the Lower Duck Creek Dam (T 386).

When he first went down there, there was about two or three second feet of water flowing in the Duck Creek which was being diverted at the Upper Dam. There was rarely any water as late as the first of August (T 455).

North of the slough, that meadow-land was west of the witness' father's house and there were greasewoods over there to the Duck Creek Slough and then the land he was cultivating was north of the Duck Creek Slough. That was all cultivated from the Duck Creek Slough over to the highway, that runs from Benjamin to the ranch after you get west as far as Fredericks, that was three-fourths of a mile north and south and one mile west and east (T 463). They cultivated that and irrigated it with two or three second feet of water, they irrigated all they could with it. The land was all broken up and they irrigated all the water would irrigate. When he went there in 1870 both dams (Upper and Duck Creek Dams) were constructed at that time. He drove across both of them. There was a wagon

road across the Lower Dam. He didn't know which one was constructed first (T 463).

The size of the ditch that they used to divert water from the Upper Dam was about five feet across the top and about three or four feet deep. That was in about 1880. He saw flowing in that ditch about four or five second feet (T 464).

In the early season in the early days, water came through the slough and spread out all over the country until about the first of April and along a little later when they began to irrigate. They began to irrigate the corn and grain there about the first or middle of April or the first of May, along in there. If there would be no high water, there would be no hay (T 466).

From then on, they didn't irrigate the land.

The spring irrigation and the high water makes the meadow. The water runs over it in the winter; over all of these springs and the Payson Field and it comes out through there (T 468). Water can be beneficially used on these meadow lands as early as the first of April or in March. It runs over the meadows all winter and there is ice on it. When he was a boy, Duck Creek continued on and beyond where the Stevens Dam is now. It ran northwest until it got beyond the meadow and run into a channel and from there into the lake (T 469).

When the high water is on it, it spreads over there for a mile wide. It didn't need any dam or plank to divert it out on that land down there, there wasn't any banks there, it was just a level country with a little channel of bullrushes growing in there and the bullrushes grew up and they began to back the water up and it flooded all over there. Whenever the high water came, it flooded all over

the whole country. In about 1885, he understood Junior made a ditch from the Payson Field and across this Duck Creek Slough (T 472). That was about midway between the Stevens Dam and the Duck Creek Dam. Andrew Stewart, Jr. put that in. He wanted it over here to water this land and south of the racetrack pasture and that is where he put it; he put it over here through the Duck Creek and put it onto this land south of the racetrack pasture and east of it. I think it is a little further east from the land painted green, red and black (exhibit A)—north of the blue and in between the blue and red. He just kept the water ponded in there and tried to make grass (T 473).

He would get water from the Duck Creek Slough right where his flume crossed the slough. The witness didn't think there was any other place he got water from, not before Eighty. He thought he got some high water from the Lower Dam, down north of the field, north side of Lindstroms. There is an old fence ditch that comes down there and he took the water down there in later years from the Duck Creek Dam. He got water across the slough through the flume and then supplemented that water with water he diverted out of Duck Creek at the Lower Dam, put the two together and made more of it (T 474).

In those days, they used to make pole fences and they would put up two poles and then dig a ditch along the one side of it and throw the dirt up under the poles and the ditch to keep the cattle from getting through the pole fence (T 478).

"Q. Was it used in those days for irrigation, when it was first put in there?

A. I never saw anything irrigated west of that. It was used for a pole fence, to keep the cattle off from this Jolley Field." (T 479).

Later he used a ditch fence to supplement water he brought across the slough. He brought the water across Duck Creek on the land in white immediately east of the red section, south of the houses up there. Mr. Payne took water down on that land the other day that he owns and he was planting some stuff on it. It was the area in white on plaintiff's exhibit A, where Stewart used the Payson and Duck Creek water (T 480-481). (That land is not claimed by plaintiff). It was the land now owned by Lavon Payne (T 481).

He didn't know whether water was used on the tract designated on exhibit A in green or red. He never saw it used there. He had about sixty or seventy-five acres in there, the white tract immediately east of the red and green, a tract of land that Payne, one of the defendants, came onto, the tract of land that he knows as the "Payne Property", that is where he put the water (T 481).

The water that was diverted from the Benjamin Slough at the Lower Dam commingled with the water that came from Petneetneet Creek and the other springs to the south; the Payson meadows and were used to irrigate some of these lands down below. It couldn't be the land in pink because that would be too high. He was sure of this (T 488).

It was early in the Spring when there was lots of water all over the country when the water came from Lower Duck Creek Dam that commingled with the Payson stream. When they irrigated from the dams there was none coming through there (T 490-491).

Mrs. Charles W. Hickman

Mrs. Hickman was sixty-seven years old; has watered

twenty acres from the Duck Creek Irrigation Company (T 388). The Lower Dam of the Duck Creek is in the corner of her land. Her land is immediately north and east of the same (T 389). She has owned that land since 1910 and it has been irrigated every year since then during each and every season from the Duck Creek stream. She owns forty-one shares of stock. She does not have enough water. She owns some Strawberry water, and got that to help out as a supplementary right (T 390). She owned the land prior to the time of the incorporation of the Duck Creek Irrigation Company and used the same water prior to 1917 and in about the same amount and in the same place (T 392).

When the flood water is on, when the snow and ice is melting, it will run over the lands and the meadows, and the slough is high—that is before the ground is thawing—early when the ground gets thawed out and the flood waters come down, that is before they plant. The earliest time they have irrigation, she thought, she did not have more than four second feet at the Upper Dam (T 394).

She was one of the original incorporators and signed the Articles of Incorporation of Duck Creek Irrigation Co. She has two shares of water for one acre of land at the Upper Dam. This twenty acres is some she had independent of the right of her husband in the Duck Creek (T 397).

Those who used water through the Upper Dam continued to use the water represented by their shares through the water delivered from the Upper Dam and those who used the water under the Lower Dam continued to use the water under the Lower Dam (T 401).

(Defendants' exhibit 4, being the Articles of Incorporation of the Duck Creek Irrigation Company, was received in evidence.)

She had known Ray Stevens, who testified in this case, for forty or forty-five years and she and her husband had frequent contact with him at the house and she never heard him make any claim before to the Duck Creek water. Her husband at one time was chairman of the water group after the incorporation (T 406).

The Upper Dam was used as a reservoir; they would shut the water off for twenty-four hours and then you could get a stream. Maybe another man had shut it off before so he could get a stream. There are times when you couldn't get it and have a good stream. There is some seepage that comes back below from the ditches. None of the water that came into Duck Creek below the Upper Dam was available to her and the other users on the Upper Dam (T 409).

She had frequently irrigated her land down by the Duck Creek Dam and had never seen Mr. Stevens taking water out of the Duck Creek Dam when she was irrigating (T 413).

Elmer A. Jacobs

Mr. Jacobs was a civil and irrigation engineer and has had experience in hydraulic engineering (T 413). His qualifications were admitted (T 414). He had measured Duck Creek within the past few days at several places and had prepared a map showing the places on the stream where measurements were made. Defendants' exhibit 3 is a copy of such map. All of the measurements were made Saturday, June 15, 1946 (T 414). .

He made measurements at places marked "A" and "A prime" (at "B"). He made three measurements at or near "B"; one at "C" and one "D"; one at "E"; one at "F" and one at "G". These measurements are either on Duck Creek or on drains running into Duck Creek or canals out of Duck Creek. "A" was measured at the drain just before getting into Duck Creek (T 415). Details of the measurements appear on the transcript pages 416-419. The witness prepared for the benefit of the court and counsel a tabulation of these measurements on a slip of paper (T 415-416).

The total flow being diverted through Lower Duck Creek was 2.01 second feet. The dam is a substantially tight dam with very little water seeping through it (T 419). There was 1.13 second feet of water at the Stevens Ditch (T 422).

Defendants' exhibit 3, being the map on which the engineer indicated measurement, was admitted in evidence without objection (T 4423).

Defendants' exhibit 2 was prepared from prints in the old county recorder's office pasted together in order of location. There has been indicated upon the map in red the location of the canals and the irrigated lands near the Duck Creek and outlined in the blue are lands irrigated from Duck Creek. The piece in the northwest corner, that is, in Section Thirty, is on a smaller scale—one-half as large as the remaining part of the map (T 424). The scale is six chains to the inch and in the northwest corner, three chains to the inch (T 424).

He thought a reasonable duty of water would be seventy acres to the second foot, delivered at the land, based upon the flow of water allowed by the State Engineer in

his certificate. He thought the average duty of water throughout the State is higher than that, probably about fifty acres to the second foot. He thought in the case of this land, seventy acres per second foot would be a reasonable duty; it is heavy clay ground and the seepage would not be heavy and the land would hold water very well (T 433).

But in estimating the duty of water, he assumed that the water is available as needed. A stream to be economically used would have to be larger than a second foot—a good stream would be three or four second feet; a good irrigator would use five or six (T 4435). He thought that at the rate he testified to, the land would need a steady stream (T 436).

At point "B" at the Upper Dam, he made a measurement of 1.68 second feet (T 438). The 1.93 second feet is the amount of water that comes out of an eighteen-inch drain, plus the amount of water leaking through the pipes. That is the total flow below the Upper Dam. He measured the water at the canal at "B", being water diverted above the dam. That was .84 of a second foot (T 4439).

From his observation, he did not think there was any substantial seepage or loss of water coming from the Upper to the Lower Dam. Between the Upper and Lower Dam, there was an inflow of .08 (T 441). If a diversion at the Upper Dam had been turned down it would have amounted at the Lower Dam to 2.85 second feet; that would be the amount that would reach the lower dam. If there had been no seepage coming in below, it would be 2.77 second feet (T 446).

When the water is available only for a short period of time more than a seventy-acre duty of water on some of

that land would be a good thing (T 641). He thought it could get along with about four acre feet to the acre; it could use six but it could get along with four, he thought, pretty well throughout the year. When he stated four acre feet, he said he meant that would be the total amount of water for that land covering all the irrigations from the beginning to the end of the season, probably going over a period of six months (T 641-642).

Clay Ashworth

Mr. Ashworth lives about four miles west of Payson; he is fifty-six years old; from 1917 to 1928, he lived near the Andrew Stewart, Jr. and Sr. property west of Benjamin. He was there when he was eleven years old (T 491).

He owned the southeast corner of Section 30. He got most of the water from the Lower Dam of Duck Creek (T 492). He grew grain, hay, beets and corn; occasionally he had seventy acres of pasture (T 493).

He started irrigating along in April of each year. Irrigated hay along in May and grain along in May. When he started irrigating the farm he turned the water down the ditches—the biggest share. Occasionally, there may have been a little left but most of the time he took it all (T 494). Whenever anybody started irrigating he took it all (T 495). When there was a big stream, it was necessary to irrigate along in April (T 496).

He was secretary of Duck Creek Irrigation Company for a few years. He had known Ray Stevens since 1917 (T 496). During the eleven years he was there, Stevens took some water from Lower Duck Creek Dam for three or four days. He made a ditch up the lot about sixty rods north of the section corner (thirty) where his home was

and he ran it up to the north line and across the land and he and Mr. Van Wagoner ran the water down there. It soaked through the witness' farm for forty rods and he went up and pulled the approaches out and ploughed the ditch in. That was two or three days after they had the water. Just as soon as it got dry enough to do it. They did not take the water through there again while he was there. Mr. Stevens never attempted to irrigate through these ditches from the Lower Duck Creek Dam to his property west of the witness while he was there during the eleven years (T 497).

The witness was there all the time, practically, and Stevens never, except the one time, attempted to take water across there. During part of the time, he was secretary of the Duck Creek Irrigation Company and in a position to know whether he did conduct water from the Lower Duck Creek Dam to his land. Mr. Stevens, on several occasions, said he would like to get some high water down through there. The witness told him it damaged his ground and subbed it and he didn't want it down there. He wanted to make pasture down there and they were trying to farm. He never attempted after this occurred to take any water through there. He never claimed to have any rights to the witness while he was down there (T 498). He never once asserted he had any right to the use of the water through the Lower Duck Creek Dam. The witness didn't think he ever at any time asked him to open the Lower Duck Creek Dam and allow the water to go down to his lower country; he never asked the witness (T 498).

When he was secretary, they rotated among the stockholders to a certain extent; there were times when somebody didn't want it and the others would take it. When

they didn't want it when they began the irrigation season, they kept it in one stream in the lower part. The upper one took out, and the lower one took out. When the water was low, they took turns with the Upper Dam too (T 499).

The witness knew Howard Stevens, son of Ray Stevens; he never came and got any water from the Lower Duck Creek Dam at any time that he was there. And Mr. Stevens' employees did not during the entire period he lived there—for eleven years (T 500).

He got his water from A. J. Stewart, Jr. (T 500). He had ninety shares and had one hundred thirty-two acres of land. They originally figured one share per acre. All my land was irrigated in the early water right and when it was low, they figured on the ninety shares watering ninety acres (T 502).

Carl Lundell diverted his water at the Upper Dam; Joseph Hand at the Upper Dam; Frederick Lundell at the Upper Dam; David Kikesell at the Upper Dam; Charles Hickman at the Upper Dam; Gustave Lindstrom at the Upper Dam; J. A. Lindstrom at the Upper Dam; C. J. Selin, Lower Dam; O. R. Stewart, Lower Dam; A. J. Stewart, Lower Dam; Evan Evanson, Lower Dam; A. E. Lundell, Lower Dam (T 510).

By means of Duck Creek and Strawberry water, they were able to water their crops most seasons (T 513). It took all the water that he could get out of Duck Creek and also their Strawberry water in order to properly irrigate and cultivate the farm during the years that he was there. They had not water to waste during the summer (T 514).

He did not mean that he took all of the water in the early Spring. He put it in his pasture along in April (T 514). They used to irrigate the hay more in May and June.

It depended on the season. Other than hay and grass-land, they ordinarily began to irrigate down there the latter part of May—that is, for grain. That is about right for alfalfa too. In other words, when the water gets scarce, they feel that they need it and they irrigate, that is when the ground dries up. Earlier than that, they irrigate pasture land. The northeast part of the tract marked in red on plaintiff's exhibit A in Section 30 was all in greasewoods when he was there (T 515). And he never saw Mr. Stevens grow any crops on that. There was not any tract in the northeast part of the tract in red that was being farmed at that time (T 516).

Ivan Stewart

Mr. Stewart has resided at Benjamin practically all his life and permanently since 1918; fifty-five years old (T 517).

He knew where the north part of the Stevens land is on the greasewood and he knew where he had a piece of land up in the northeast corner in red in 1925. He could be wrong within a year but Stevens, this witness said, farmed some of that land on that section in one year; one year is all he remembered (T 518). One year, Van Wagoner and Mr. Stevens had some crops down there. Van Wagoner is on the north and Mr. Stevens in on the south. He saw no crops in any other years and he had been there practically all that time (T 519). He thought it was in 1925 or 1926. The piece was broken up a few years before, but not many. There have been crops come up there and the land was used for grazing in other years (T 520).

George W. Tucker

Mr. Tucker resides at Provo, Utah; Sixty-four years old; owned a farm in Benjamin, Utah; got it from A. J. Stew-

art Estate and then the balance from the Benjamin Drainage District. Went there to take the place in 1928 (T 521). The land he acquired was immediately east of the land owned by Ray Stevens (T 523).

During the time he was there, Stevens didn't, to his knowledge, take any water through the Lower Duck Creek Dam to any lands west of the lands in possession of the witness. There were no ditches that would carry the water to his place. He knew of none being taken through previous to the Spring of 1933. The drainage district was in and there were numerous places where the water came to the surface. There was another drain headed just a little west of Duck Creek below the Lower Duck Creek Dam, diagonally across what we called the "Eliza Stewart Place", until it got down on the other part of the A. J. Stewart Estate and then north, and then west; there was another one came west and there was water in here, on the west side of the section line and south and west of the place marked "Ashworth Home", near the northeast corner of the southeast quarter of Section 30 (T 525).

A. J. Stewart Estate entered a suit against the drainage district for damages caused to the crops by drain water (Stevens property) (T 526).

Mr. Stevens came to the witness early in the Spring of 1933 and asked if he would permit him to take water through two ditches that lead through that property to his place. He asked permission to enlarge the ditch and take the water across the witness' property before the rest of them were needing water, and he wanted to water his grass before the irrigation season started. He wanted to use the ditch just north of the Clay Ashworth house, going west (T 527). The witness told him that he had no objection to his taking the

water through when there was water to be had. That would be early in 1933 before they were starting to irrigate their crops. They started to irrigate in May on an average, and if things were dry as it was in 1933 and 1934, they were irrigated in April. As he remembered, it would be in March or the early part of April—he thought March when Stevens approached him about taking the water (T 528).

He recalled that after they started to irrigate crops there wasn't any water to take out of the Lower Dam in 1933. The water varies. Ordinarily in these drouth years, it got so low that the people in the Upper Dam released their water entirely and there was no one, only Mr. Stewart and the witness, on the lower end that could get enough water to irrigate a garden (T 529).

When Mr. Stevens first approached the witness about taking water down through his ditch he said "I was a damn fool for not going in with these people when they asked me to. I didn't think I would need any water, but I find I do" (T 531).

The witness acquired the Eliza Stewart property along in 1935. In that year, Mr. Stevens came to him and asked permission to enlarge the ditch in order to get water through the witness' ground and he granted the permission. The witness told him he wanted to change the course of the ditch and Stevens said he would help him. Thereafter, he took some water through there (T 533).

Invariably, he would come and ask if the witness were needing all the water. The witness didn't know of his taking the water at any time they were using it (T 534). In those years it took all the water from the Duck Creek and the Strawberry water to take care of the farm and then

they were short of water. He was in charge until about 1938 (T 535).

Always they would figure on at least two irrigations and possibly three. Prior to the irrigation time, there was quite a run-off from the upper country that accumulated over quite an area and early there is a good stream. Sometimes, it is as big as the channel but by July, there was a fair irrigation stream for each dam, the upper and lower. They wouldn't start to irrigate until it was dry (T 536).

They usually took all the stream there at the Lower Dam but not always. Sometimes there would be more than they needed, depending on the year and whether or not it was a dry year. Mr. Stevens told the witness a number of times to let the waste water come on down and then said, "If you don't want to use the water at night when the water is flush, take the dam out and let it come down into these greasewoods."

The northeast portion of the land owned by Mr. Stevens in Section 30, colored red, over to the north side of his piece immediately northwest of the fifty-acre tract that the witness first went into possession of when he went there in 1928 was not being farmed. It did not give any appearance of having been farmed recently. There was an area on the north that was cleared of brush but there was no indication of any crops. During the time that he went there and up to the year 1933, there had not been any irrigation by Mr. Stevens of that corner (T 537).

Mr. Stevens never at any time asserted to the witness in any way, shape or form that he owned the water right in Duck Creek through the Lower Dam. He never interfered with the taking of water by the witness or other stockholders in that Lower Dam (T 538).

After they began to irrigate, they generally took the entire stream and made a tight dam at the Lower Duck Creek and fought with the people at the Upper Dam to get a little more water, in a neighborly way. They were terribly short of water in the low-water season. The fact that they gave us so many shares of water for our land didn't indicate anything as to the size of the stream. The division was made by period of time; we had the water so long per share, whatever the stream was, it was diverted for the time and we took it in rotation and we took it whenever water was available (T 549).

With the biggest holding of the Duck Creek water of anybody in the country and with the twenty acre feet of Strawberry, at no time was the witness able to water all of his farm after July.

Mr. Stevens came to the witness—there was a big flush of water coming down Duck Creek, and it was before anybody would be irrigating the ordinary crops of grain or hay—and he asked permission to enlarge the witness' ditch to get that water before it was needed by the company and he said he didn't claim one inch of primary right in the company. He told the witness that in the Spring of 1933 (T 554). He never expressed anything to him that would indicate that he claimed any priority in the water. He stated he didn't claim any water right. He said, "I don't claim any right in that dam." (T 555). He never expressed a claim to any water to the witness and he did disavow the claim to any water after the flush or early Spring flush (T 557).

Francis L. Lundell

Mr. Lundell has resided at Benjamin most of his life; he was fifty-one years old (T 569).

In the wintertime when you get a deposit of snow over the basin area, and it is freezing the water, the stream is down and then immediately when it begins to start to melt there is a large basin covering with snow and ice and then we have a large stream, that usually takes place during the months of February and March, the large stream. It will start to dwindle in April. There are exceptions to that rule. You could have a heavy rainfall over the basin in April or May and with the heavy rainfall, it may have a flush for a few days (T 572-573).

As the irrigation season advances, the South Field Irrigation has no waste water and the basin very largely dries up and this dwindles the stream. In a year like 1934, it didn't have any water to even run out of its reservoir by the 15th of May (T 574).

At the point where his father diverted water for twenty-one acres, the diversion would take all of the water as early as the middle of May, so that there would be none flowing by the dam at that point. This occurred before 1915 more than it has after, because there was more water available through the Strawberry afterwards. After bringing the Strawberry water in, up until the month of June, there was a slight increase in the water available (T 576).

The construction of the Benjamin drainage system was completed in 1921. In addition to being treasurer of the drainage system, he was supervisor for the drainage district. Benjamin Drainage District has forty-six hundred acres which empty into Duck Creek. The drains

were put in for the purpose of getting water out of the ground and getting rid of it (T 578).

As a general rule the water would decrease to the point where it was all used for irrigation at the two dams as early as the first of May to the fifteenth of May, taking that as an average. The only time there would be any overflow at either dam would be if they would get a heavy rainfall and a quick flush that might last for three or four days (T 589).

O. R. Stewart

Mr. Stewart lives in Salt Lake City; sixty-eight years old; born and raised down in the territory covered by Duck Creek (T 590). His father was Andrew J. Stewart, Sr. He served as an officer of Duck Creek for probably fifteen years. He believed he was secretary most of the time between 1911 and 1927 (T 591). His recollection of irrigation under the upper ditch began back in about 1885 (T. 593).

The witness referred to the map (defendants' exhibit 2) and the acreage indicated there and stated that that acreage squared with his recollection. (The acreage shown under the Duck Creek Company totals approximately four hundred fifty according to the map.) The witness named the numerous parties who irrigated under Duck Creek as long as he could remember (T 599-615). From his earliest recollection, all of the land that he identified on the map under the upper ditch had been irrigated out of Duck Creek. He could remember back to perhaps 1885 (T 604). He then identified the land irrigated under Duck Creek Dam proper, during all of his recollection (T 606-622).

The land on the lower ditch in the early days would

sometimes be covered with water requiring the necessity of having ditches to drain it off. This was in the early spring. They made waste ditches pretty near everywhere; they would run to the West and to the South (T 623). Many of these waste ditches which they used to get the water off their land in the early Spring of the year ran to the land owned by Mr. Stevens. One waste ditch went into the greasewood section (T 624).

The witness had something to do with incorporating the company and transferring rights which the landowners and water users had in using on that property. They had two reasons for incorporation. One reason, the Upper Dam and the Lower Dam people weren't getting along too well; they insisted on using the water and shutting the water off and cutting others out and in order to keep from having trouble among themselves, they organized and granted a fifty-fifty right at the Lower Dam (T 625).

One would take it for a week and the others would take it for a week. In the early Spring there was enough for two streams—April and March. Usually along the first of May, they started working on a weekly proposition. There wasn't enough water for two streams (T 626). They then divided the water fifty-fifty and the upper group was given half of the shares. The lower ditch had three times as much land as the upper ditch. They decided to make it as near four hundred shares as possible because they had slightly over one hundred acres under the Upper Dam—maybe it would go one hundred fifty acres; and they had almost three times as much as that in the Lower Dam, and in order to make it fifty-fifty, there was a division (T 627). In order to make it a fifty-fifty proposition and give them half of the water naturally each holder in the

Upper Dam got two shares to the Lower's one—two shares per acre—and as a matter of fact, all the land in the upper ditch has a supplementary water in the Strawberry because they don't have enough water out of Duck Creek and also in the lower section, although the Lower Dam has three times the land, they only get half of the water and that was not enough to take care of the land (T 628).

Even in the upper ditch where they had two shares per acre, they were in difficulty over water and had to get a supplementary supply on account of the slough getting down low in July and August (T 629). When the Benjamin Drainage District was organized and completed its drains, it brought more water into the valley from all directions there. The Upper Dam people never were able to quite dam the water off. They would always have leakage and then the two drains that emptied into Duck Creek just below the dam made it so that the water was almost divided fifty-fifty under these conditions (T 630). It was the program that those who were using water out of the Lower Dam and out of the Upper Dam would make their conveyances to Duck Creek Irrigation Company (T 631).

From that time on, the distribution was under the hands of the Duck Creek Irrigation Company. The company issued certificates of stock to those who got water from the corporation. In 1934 they got permission to put down a well (T 633). Unfortunately, they didn't get any water, although the well was an enormous expense (T 635).

During the period of time that he was there, there was absolutely no protest to the company's ownership. No one ever came so far as he knew to make any objection to the taking of water out at the Lower and Upper Dams

and damming the stream off tight at these times. When the water got to the point when they had to irrigate (T 636). Ray Stevens never came to him or any of the officers of the corporation that he knew of, or made any claim or protest.

When it became necessary to irrigate the lands under the upper and lower ditches, they dammed off the streams tight at the Upper Dam and the Lower Dam. That was necessary because it took all of the streams to irrigate our lands at both of these points.

Going back beyond the incorporation of Duck Creek, from the earliest recollection he had, there was absolutely no objection about taking all the water from that stream when it became necessary to irrigate the lands. There was no interruption as far as he knew (T 637).

Defendants' exhibit 6 is a schedule of water turns which is a type of schedule they used for the Lower Dam and which divided the entire stream among the stockholders of the company without reference to Mr. Stevens (T 640).

The land irrigated at the time Duck Creek was organized was about the same in amount as that under cultivation when the witness first recalled the situation; possibly a little different but not much (T 645-637). They drew half the shares on the Lower Dam which would be two hundred seventeen and they were trying to irrigate almost two hundred acres more than that (T 657).

The reason Eliza Stewart was not allocated water from Duck Creek was on account of Payson water. It was the closest to the Payson water and she was to get the Payson water. The Payson water had been used on Eliza's ground more than any other ground (T 662). The water brought

over from the Payson Springs was not a large stream—one or two second feet (T 664).

He believed that after the first of May if the whole stream from Duck Creek was turned down on Ray Stevens it wouldn't more than reach there until it would be soaked out and gone. That is the average year (T 672).

The witness put in some of the waste ditches. They used the hollow in lots of instances, that is, Mosquito Hollow (T 678). This waste ditch coming through the Stevens field was a continuation of the Hollow (T 679). They dug a deep drain through the Stevens field and lost several cattle in it and it went through his field and down to the Douglas fence line; that was the west line of this race-track or greasewood pasture and then it run north; he didn't think Stevens ever used it for irrigation; it might have been lower down but it wasn't in the eastern part (T 680).

Stevens wanted the waste water and he was very anxious to get it, never complained; that is why they made the waste ditches or drains (T 685). The waste water at times was possibly two second feet when they were draining off the irrigation water (T 686).

The ditch draining off the water we put in to get the water off the bottom of their crops. By the time they got it all irrigated the water standing at the bottom and the land is level and the water has to be quite deep before it moves on through (T 687).

In the early Spring when the whole country is wet and Duck Creek is loaded with more water than usual, even then our land we were farming would have to be drained through some of these waste ditches. As to the waste ditches, we always get it off and push it down to Stevens

and he always wanted to use it so far as I know. Except the time they were making the drains down through Stevens, he didn't remember him objecting to it (T 690). (Then he was objecting to too much water). All Stevens was entitled to on the greasewood field was what water ran off their land after irrigation (T 693).

Parley E. Lundell

Mr. Lundell had been an officer in the corporation since 1926 and was well acquainted with the Upper Dam and the tributary ditches to it, and was acquainted with the Lower Dam until 1942 (T 695). Each and every year out of the upper and lower ditches the owners under these ditches have been using the water and putting it to beneficial use in growing crops. Except as he mentioned to Mr. Bishop in 1945, no one came to him and made any protest about the water, or made any claims adverse to the Duck Creek Irrigation Company (T 700). Stevens never made any claim or protest, or Mr. Woodward, or Mr. Cottam, who succeeded them (T 701).

LaVon E. Payne

This witness testified that he resides in Provo, Utah, and owns a piece of property in Benjamin; irrigated from Duck Creek; has nearly one hundred fifty acres and got most of it from George W. Tucker (T 710).

He had under contract sixty shares of water of Duck Creek and fifteen shares in addition which he bought from Art Hansen (T 711). Practically all the high water is gone after the first of May. Irrigation begins after the first of May. Since he has been there after the first of May practically all the water has been taken out except the ex-

cess when it has rained quite a bit and it has come down in big floods. When they cannot handle the water in their ditches it is turned down to Stevens (T 712).

He hadn't ever any excess water after he started irrigating his farm. He had not anywhere near enough water. He used it all. He hadn't been able to water anywhere near all his places after the irrigation season started. The irrigation season starts possibly the earliest before the first of May; on the pasture land earlier than that (T 716). He said the latest time to begin watering and irrigating crops would be the first of June. High to them meant more than they could handle in their ditches. Other than the grass land, they have been irrigating about the first of May (T 717).

In the early season there is enough water for everybody and really more than they need (T 719). Cottam and Woodward had run water through the ditches in the early Spring; they didn't run any low water through at all. Woodward run water there before the first of May (T 720). Cottam ran water through about the same time or possibly a little earlier. This was objected to by stockholders of the defendant company on the ground that they were flooding their property. The water was running over the bank in fifty places. They wanted to stop anyone from acquiring a right to the ditches (T 721).

Carl E. Lindstrom

Mr. Lindstrom stated he was thirty-two years of age; lived in Benjamin; owned fifty-six shares of Duck Creek at the Lower Dam (T 729). He was president from 1940 to 1946 and is a director now, and vice-president. The corporation took steps to make filings on drain water, dumped

it in Duck Creek from the drainage district (T 730). It made four applications. There were four principal drains that dumped into Duck Creek above the point of diversion of the Lower Dam (T 731).

Plaintiff's exhibits 7, 8, 9 and 10, being underground water claims covering the four drains, were received in evidence (T 731-732).

All of these filings are on drains above the lower diversion of the Duck Creek Irrigation Company—the so-called Duck Creek Dam. These drains discharged the largest amount of water from the latter part of May until the first part of June; in July and August, they taper off. The irrigation season up above is in the latter part of May and the first part of June, and the flow of the drainage district drains is then the highest (T 734).

Statement of plaintiff's counsel re: Upper Dam:

“MR. HANSEN: We have never questioned that Mr. Stevens doesn't know anything about the Upper Dam, we will have no testimony that will contradict the evidence because we have got none.

“MR. WATKINS: In other words, you make no objection as I understand it, to the use of the water from the Upper Dam and on these lands that have been testified to by William Stewart and these other witnesses.

“MR. HANSEN: I wouldn't say that; I will say that the evidence you got in now will not be controverted by us because we haven't any evidence to deny it.

“MR. WATKINS: Well, I want to make out a prima facie case.

“THE COURT: Well, that is cumulative.

“MR. WATKINS: I won't go any farther in view of his statement or explanation.” (T 739; see also T 21-21).

The year Mr. Cottam bought Mr. Stevens' property, he asked the witness if he could take some water down when it was available. He understood Mr. Stevens had been using some high water and he wanted to know if he could. The witness told him he was not an authority but wouldn't stop him if he took care of it (T 743). April first, the Duck Creek people shut the water off here and Mr. Cottam never got any more that season (T 744).

Mr. Woodward came to them about water in 1943. He came and helped a day getting the dam ready; he wanted to know if he could have some water early in the Spring—latter part of April (T 745). He had three or four days stream of water there at the time and then the Duck Creek people were needing the water and so they took it and Cottam did not come back any more that season (T 746).

At the meeting May 29th, 1945, the company's stockholders told Mr. Bishop they were afraid of having the water rights infringed upon and before they would let him have water, they would have to have some token of payment or something. He said he understood he had rights under the dam and he was going to find out about that and he either did or didn't and their agreement was unsatisfactory to him and he intended to sue (T 751).

The trial court found that the defendant company and its predecessors for more than sixty years had beneficially used waters when available to irrigate four hundred thirty-four acres of land devoted to raising cultivated crops and the plaintiff had so beneficially used water to irrigate sixty-eight acres of land devoted to the raising of cultivated crops and that each of them during such period had used water sufficient to irrigate one hundred acres of pasture land, but

that when the waters of Duck Creek have receded to two second feet of water at, and above, Duck Creek Dam, the defendant corporation and its predecessors have used all of said waters (R 192-193).

The court concluded and decreed that plaintiff is the owner of the right to the use of 168/568 and the defendant, Duck Creek Irrigation Company and its stockholders, are the owners of the right to the use of 400/568 of the waters of the Benjamin Slough during the period from March first to December first of each year, so long as the total flow of the Benjamin Slough does not exceed twenty-eight cubic feet per second; provided that when the flow of the Benjamin Slough measured at the Duck Creek Dam falls to a flow of two cubic feet per second or less, the plaintiff is not entitled to any of said two cubic feet per second and provided also that the plaintiff is entitled to all of the water that is discharged into the Benjamin Slough from the springs and seeps arising north of the City of Payson (The Big Springs area), which is discharged into the Benjamin Slough below the dam referred to in the evidence as the "Duck Creek Dam" and above the dam referred to in the evidence as the "Stevens Dam" (R 203-204, 213-215).

The court further concluded and decreed that during the period extending from May first to August fifteenth of each and every year, the defendant, Duck Creek Irrigation Company, was awarded for the use and benefit of its stockholders 300/368, and to the plaintiff was awarded 68/368 of the waters available for use in the Benjamin Slough above the dam referred to in the evidence as the "Duck Creek Dam"; provided that when the total quantity of water available for use above the said Duck Creek Dam recedes to a flow of two cubic feet per second or less, then

and in that event, all of the two cubic feet per second or less is awarded to the defendant, Duck Creek Irrigation Company, and the plaintiff is awarded all of the water in the Benjamin Slough that finds its way into such Benjamin Slough below the Duck Creek Dam and above the dam referred to in the evidence as the "Stevens Dam" (R 204-205, 213-215).

The court also decreed to plaintiff the right to utilize ditches described in the decree, leading from the Duck Creek Dam for the irrigation of his land (R 205).

STATEMENT OF POINTS

1. The court erred in finding, without sufficient evidence, that the plaintiff and his predecessors in interest for more than sixty years, or at all, have beneficially used from Duck Creek at, from or through the Duck Creek Dam, water to irrigate sixty-eight acres of cultivated land and one hundred acres of pasture land, or any part thereof, and in finding that the priority of any such use was equal to that of any part of the rights of the defendant company, and in concluding and decreeing that plaintiff is the owner of the right to the use of 168/568 of the waters of Duck Creek and, during May first to August fifteenth, of 68/368 of such waters, or any part thereof, as against the rights of the defendant company (Findings 9, 25 and 28; Conclusions 2 and 3 and paragraphs 2 to 5 of the Decree).

2. The court erred in finding without sufficient evidence to justify its findings, that the defendant company and its predecessors in interest had appropriated only a portion of the flow of Duck Creek during the low-water season or from May first to August fifteenth and in failing to find upon the great preponderance of the evidence that the

defendant company and its predecessors appropriated and owned at least eight second feet of low-water and an additional twelve second feet during high water, as rights prior and superior to any right of plaintiff, and in failing to conclude and decree that the defendant company is the owner of at least eight second feet of the low-water flow and an additional twelve second feet of high water flow as first and primary rights at the Upper and Duck Creek Dams (Findings 9, 25 and 28; Conclusions 2 and 3 and paragraphs 2 to 5 of the Decree).

3. The court erred in finding, as between plaintiff and defendant company, without justification in the evidence, that economical use of the waters of Duck Creek required such waters to be used in fifteen-day turns and that the practice has been for use in such turns, and in concluding and decreeing, without adequate findings, that plaintiff is entitled to use the flow of Duck Creek at, or over, the Duck Creek Dam in turns with the defendant company (Finding 40; Conclusions 5 and 12; and paragraphs 5 and 11 of the Decree).

4. The court erred in finding that plaintiff's predecessors in title had constructed any ditches leading from the Duck Creek Dam and that said ditches had been used by plaintiff and his predecessors for more than sixty years, or at all, under claim of right, and in concluding and decreeing that plaintiff had the right to use said ditches from the Duck Creek Dam, said Findings not being supported by the evidence and the Conclusions and Decree not being supported by the Findings, particularly in respect to the irrigation of pasture land (Findings 12 and 28; Conclusion 6; paragraph 6 of the Decree).

ARGUMENT

There are a number of errors of the trial court in its Findings, Conclusions and Decree, and in its rulings on evidence, in addition to the points specified above. The correction of the basic errors referred to above, however, will serve to put the Decree on a sound basis and effect substantial justice. To this end we have sought to eliminate capricious objections and to ask for a broad and practical determination of the rights involved.

An effort has been made to specify the basic errors the correction of which will effect the substantial justice required by the law and the facts. The points upon which we rely for a reversal of the judgment, re-phrased, deal respectively with the erroneous recognition by the trial court of non-existent water rights in favor of plaintiff; the failure to recognize in full the essential water rights of the defendant company; in placing on turns plaintiff's non-existent water right (and thus not only depriving defendant company of a portion of its water, but by an impractical system of turns between the parties, interfering with the proper administration of its water by the defendant company, and making inevitable the wasting of its water), and in awarding to plaintiff rights of way from the Duck Creek Dam not only for the water which the court erroneously found had been used through those ditches for cultivated crops, but also for water which the court itself conceded had been used only at the Stevens Dam for pasturage and never before through those ditches.

In our Statement of Facts, we have referred to the record at some length and as far as feasible in the actual, although abbreviated, language of the various witnesses whose testimony is cited. We have done this advisedly for

this seems the best way to meet the generalities and unsupported assertions by means of which plaintiff prevailed in the lower court.

Our argument will be based upon the facts as shown by the record, but since we have already detailed those we believe determinative, we will endeavor to avoid repetition as far as possible. However, since facts seem to make the law in this case, it does not seem that we owe any apology for re-emphasizing some of them in the following argument.

I. The plaintiff established no right to the use of water from, or over, the Upper Dam or the Duck Creek Dam; moreover, even the claims he makes are admittedly subsequent, subordinate and inferior to the rights of the defendant company.

There being no competent evidence that plaintiff or his predecessors appropriated by beneficial use prior to 1903 any of the waters from the Duck Creek Dam on land now owned by plaintiff, nor that any application has been filed with the State Engineer, nor that he used any of such waters after 1903 adversely to defendant company's rights for a continuous period of seven years, or at all; and the record affirmatively establishing that any use of water on plaintiff's lands from Duck Creek Dam involved high or flood waters beyond the needs of the defendant company or water used by its express permission and in recognition of its prior rights, and that not only did plaintiff's claimed use arise long subsequent to the vesting of the rights relied upon by defendant company but that the predecessors of plaintiff always recognized such prior rights; and it further appearing without dispute that the water plaintiff now ob-

tains from the Big Spring area entering Duck Creek below the Duck Creek Dam is sufficient to supply the maximum acreage that Stevens claims was irrigated from the Stevens Dam, plaintiff is entitled to no award whatsoever as against Duck Creek Irrigation Company.

There is no basis for any finding that the predecessors in interest of plaintiff beneficially used Duck Creek water to irrigate sixty-eight acres of cultivated crops. Where were the crops? They are supposed to be in the greasewood area, but there were only thirty acres of grain there at any time, which Stevens planted after 1906 (T 93-94, 117), and which, in fact, was not broken up until after 1906. The rest of the greasewood area is still just greasewood land and there is no showing that even so much as a furrow more of it has been plowed.

True it is that Will Stewart took some water out of Duck Creek to supplement his Payson water coming across the flume. This was after 1885, but none of this water was used on plaintiff's land; it was used on the land now owned by Payne to the east (T 473, 481, 488, 490-491). There should be some basis for the making of a finding or the award of a water right, particularly when plaintiff had the burden of proof. There just isn't any such basis supporting the court's award to plaintiff in this case.

Until 1903 when an exclusive method of appropriating water was prescribed by statute, water could be appropriated by diverting the water from its natural channel and putting it to a beneficial use. *Wellsville East Field Irrigation Co. v. Lindsay Land & Livestock Co.*, 104 U. 448, 137 P.2d 634. The elements of a valid appropriation prior to 1903 are set out in *Sowards, et al v. Meagher, et al*, 37 U.

212, 108 Pac. 1112, and *Tanner v. Provo Reservoir Company*, 99 U. 139, 98 P.2d 695.

However, we need not get down to fine points on the elements of appropriation as far as plaintiff's claims are concerned. None of the elements are present.

As was said in the case of *Riverton Pipe Line Co. v. Bear Canyon Pipe Line Co.*, 57 U. 630, 196 Pac. 1004, there is really little law involved. The sole question there was who first appropriated the water involved in the case. In our case, there is no question but that defendant company's predecessors first appropriated the water. But there is a serious question as to whether plaintiff's predecessors ever did make a valid appropriation of any amount whatsoever. The testimony of Stevens, their principal witness, related to use after 1906. There was no proof of any diversion and use on land now owned by plaintiff prior to 1903, particularly of anything except flood or waste water. No particular quantity claimed to have been used prior to 1903 is even suggested in the evidence. Since 1903, before a person can successfully claim a right to public surface water, he must show that he has filed an application with the State Engineer in compliance with the statute. *Deseret Livestock Co. v. Hoopiania*, 66 U. 25, 239 Pac. 479. This the plaintiff has not done.

Should it be assumed for the sake of argument that plaintiff's predecessors ever actually appropriated water in a manner authorized by law and that an answer could be found as to where, on what land and in what amount such appropriation had been made, there still would be insurmountable obstacles to the recognition of plaintiff's claims as against Duck Creek Irrigation Company. The predecessors to the defendant company were the original ap-

proprietors on the stream. J. W. Stewart remembered seeing their two dams in place as early as 1869 or 1870 (T 366 and other references in Statement of Facts). Defendant's priority, therefore, would date back sometime before 1870. We have seen in the Statement of Facts that no water was used from the Big Spring area, mixed with Duck Creek water, until after 1885 and that none of this water was used on land now owned by plaintiff. It has been shown that the use made by Stevens from time to time after 1906 has been merely a high, or surplus, water use in full recognition of the prior rights of the Duck Creek Irrigation Company. It also clearly appears that plaintiff and his predecessors had the Big Springs area flow which amounted to as much as the trial court awarded as a first right to the defendant company. So, even assuming that there had been an appropriation by plaintiff's predecessors out of Duck Creek, which we deny, it is impossible to find any justification for making it equal in priority with any portion of the rights of the defendant company.

There is no basis for any claim of adverse user. In fact, the evidence of plaintiff is so opposite to that necessary for the establishment of an adverse right that its effect, instead, is to affirmatively show a recognition and acceptance of the prior rights of defendant company over a period of many years. Both Stevens and his son admitted that as long as they were farming the ground later acquired by plaintiff they never sought to use any water when the people above were using it. Only twice, Stevens said, did he attempt to take the flash board out of the Lower Dam—once in 1922 and once in 1927—and on both occasions, they were immediately replaced and he took no further action.

All of the other witnesses, whether for plaintiff or defendants, conceded that the defendant company and its predecessors always took from their two dams all of the low water and such of the high or flood water as they needed.

The use of water from Duck Creek at or over Duck Creek Dam being limited to excess amounts which he took by permission or because not needed up above, the principle of adverse user could not apply. Moreover, it is almost universally held that adverse use will not "run upstream", and that use by one whose point of diversion is located below the headgate of another will seldom be adverse to the upstream claimant. *Wellsville East Field Irrigation Co. v. Lindsay Land & Livestock Co.*, 104 U. 448, 137 P.2d 634.

To be adverse, the use of water must have been accompanied by all the elements required to make out adverse possession; the possession must have been an actual occupation, open, notorious, hostile, and under claim of title, exclusive of any other rights, and continuous and uninterrupted for a period of seven years. *Spring Creek Irr. Co. v. Zollinger, et al*, 58 U. 90, 197 Pac. 737.

In *Francis v. Roberts*, 73 U. 98, 272 Pac. 633, it was determined specifically that where the lands of the defendant were higher in elevation than the plaintiff's lands so that the waste or surplus water from the irrigation of the defendant's lands naturally flowed down to the plaintiff's lands, the plaintiff failed to show that his use of the water was adverse and hostile to the use by defendants, as there was nothing to show a hostility to, or denial of, the right of the owners of the upper lands to use the water whenever they desired.

The Big Springs area or Payson Slough water, years

ago having been brought across Duck Creek by flume and applied on the Eliza Stewart lands, was later supplemented by Duck Creek water on the Eliza Stewart lands, now belonging to LaVon Payne. Since then—about 1927—the Payson Slough water, including Big Springs, has entered the Duck Creek channel between the Duck Creek Dam and above the Stevens Dam and has been available to plaintiff and his predecessors in interest to satisfy such rights, if any, as they may have. The evidence shows this flow remains throughout the year at about two second feet and in high-water periods, increases the same as the flow from Duck Creek increases up above. This is more than adequate to satisfy any possible rights which the plaintiff has shown in the case. Why should the plaintiff have an average of two second feet from the Big Springs area free from any claim of those up above, plus excess high water over the defendant company's dam for one hundred acres of pasture land at the Stevens Dam and yet attempt, as he succeeded in having the court do, to limit the defendant company's diversions to two second feet for all of the intensively cultivated and irrigated land of its numerous stockholders?

The award to plaintiff as against the defendant company cannot stand in whole or in part.

II. The predecessors of Duck Creek Irrigation Company, as shown by the great preponderance of, and almost the undisputed, evidence, were the original appropriators of the entire flow of Duck Creek at, and above, the Duck Creek Dam and since prior to 1870, have beneficially used the entire flow thereof except during excessively high water, without interruption or questioning of their rights by

anyone, one-half of the flow ordinarily being used by the Upper Dam as a first right conceded even by plaintiff, and one-half at the Duck Creek Dam, and the evidence required an award to the defendant company of at least eight second feet of the flow of Duck Creek at and above the Duck Creek Dam during low water and up to an additional twelve second feet during high water, or a total of twenty second feet, as a first and primary right before pro-ration with the plaintiff or anyone else.

The volume of the Duck Creek Irrigation Company's right, based upon the appropriations of its predecessors in interest, is material at this point as it seems clear that whatever the extent of that right is, it is superior and prior to any claims of the plaintiff.

Prior to the incorporation of the Duck Creek Irrigation Company in 1917, the predecessors in interest of that company severally appropriated the water on the lands now under the company. These appropriations were completed long before 1903, and by the terms of the Articles of Incorporation of the Duck Creek Irrigation Company the several incorporations conveyed and assigned all their water rights and rights of way for ditches to the corporation. The rights to water, except for the filings on the drain waters, were complete at the time of the incorporation, and it is immaterial that division was made between the Upper and Lower Dams after the incorporation, or how much acreage is now served by each, as the total appropriation was conveyed to Duck Creek Irrigation Company at the time of the incorporation, and we must look to such total in defining the Duck Creek rights. Plaintiff makes no claim to water from the Upper Dam and Stevens admits that he never

questioned the right of the company to dam the entire stream off there, or for that matter at the Duck Creek Dam either. Since the same entity—the company—owns the water right for both dams, this in final analysis is an express concession of the superior rights of the company to the entire flow. The company has determined the divisions between the two dams without reference to plaintiff's predecessors.

The record shows that the several appropriators had beneficially used water on at least four hundred fifty acres prior to 1903. We have not only the testimony of the Engineer but of practical irrigators that all the water used by Duck Creek Irrigation Company was necessary to irrigate the lands covered by this incorporation. O. R. Stewart placed the amount at ten second feet from each dam, being the capacity of the company ditches. All the evidence, both practical and expert, must be weighed and consideration must be given to the fact that during the main irrigation season, the flow recedes to a stream so small that it often can be used out of only one dam and even then does not furnish a proper irrigation stream.

Plaintiff has a continuous flow of about two second feet of water throughout the year from the Big Springs and adjacent areas south of Duck Creek which is not available to the Duck Creek Irrigation Company. The plaintiff, even during high water, can claim no lower duty of water than the company because it has a constant flow from the Big Springs and the Payson pasture area, approximating the volume from the drains, or exceeding it. He can, as a matter of fact, claim less water per acre, for the evidence shows that the Duck Creek Irrigation Company area is all heavily cultivated and is on slightly higher ground, requir-

ing more water, while the Stevens land is lower down and actually requires less per acre and has been, in large part, waste land with no attempt ever being made to raise anything but grass thereon.

All the witnesses were agreed that except for a flush period, there was and is, insufficient water in Duck Creek to water the lands of the stockholders of the company, and that generally at all times after about May first, the company must divert the entire flow. Many stockholders have been required to purchase Strawberry water as a supplemental right.

Whenever the irrigation of crops started, the Duck Creek Irrigation Company has required all of the water and this has not been sufficient except during heavy rains. When the flow fell to where the Duck Creek Irrigation Company ditches would carry it, they have generally used all the flow, the ditch at the Upper Dam carrying about ten second feet and those at the lower, an equal amount as maximums.

No one even now questions the right of the Duck Creek Irrigation Company at the Upper Dam. See page 21 of transcript where plaintiff's counsel states that he does not claim anything in the Upper Dam. See also transcript pages 77-81, 548-549, 589 and 625, where Stevens testified that when water got low, he was cut off quick, even when there was some in the stream and during low-water, he didn't go up to Duck Creek Dam. See also Stewart's testimony that when the water in the old days got to two or three second feet, they would take all of it at the Upper Dam (T 365). See also statement of plaintiff's counsel on pages 738-739 of the record that "We never questioned that Mr. Stevens doesn't know anything about

the Upper Dam; we will have no testimony that will contradict the evidence because we have none."

Stevens estimated that by June fifth, the water at the Duck Creek Dam dropped to five second feet or below, and that he knew they were diverting from the Upper Dam too, in which he claimed no interest (T 102-103, 157-158). It would seem that since at all times, the Upper Dam was taking at least half the water during the irrigation season, the minimum that should be diverted into the Upper Dam would exceed four second feet. It must be borne in mind that when Stevens talks about taking high water only, he is speaking of the flow at the Duck Creek Dam, the diversion at the Upper Dam already having been taken out. See also T 86 to the effect that Stevens quit using water from Duck Creek Dam when the high water quit; T 90 to the effect that when water got low, Stevens never used it from the Duck Creek Dam, as it would hardly wet his ditches, and that even after the drain brought more water, his use was mostly in the Spring. (T 91).

Under the original incorporation the water was divided evenly between the Upper and Lower Dams. There were almost three times as many acres under the Lower Dam as under the Upper Dam. The original plan was to have one share of water for one acre of land, but the Upper Dam, having between one hundred and one hundred fifty acres of cultivated land under it, got about two hundred thirty-four shares and the Lower Dam having about three times as much land—approximately three hundred fifty acres or more—got an equal number of shares. Neither got as much water as they could beneficially use, but they divided all the water between them (T 326-328, 629, 657).

The lower court held that the total cultivated acreage under Duck Creek Irrigation Company was four hundred thirty-four acres. This was based upon the number of shares for which the company was incorporated, but the actual acreage exceeded this.

On defendant's exhibit 2 are indicated by a blue outline the lands irrigated out of the two Duck Creek Dams (T 424, 599-615). This acreage exceeds four hundred fifty, based upon the acreage of the individual parcels shown on the map.

Engineer Jacobs testified that a good stream economically used would be three or four second feet, and a good irrigator would handle five or six (T 434).

When Jacobs measured the flow of Duck Creek at, and above, the Duck Creek Dam, it totaled at both dams 2.85 second feet. With that as a practical example, consider what the application of the trial court's decree would involve. Approximately two second feet would be divided between the two Duck Creek Dams and .85 second feet would be placed on turns between the two Duck Creek Dams and the Stevens Dam or through the Lower Duck Creek ditches to the land of Stevens. Never had such a thing been done or even contemplated before the trial. Never had Stevens ever had or requested any turn or the pro-ration of any water, let alone such a low-water flow. Such a result in effect would be created by the mere desire of the plaintiff for a water right his predecessors never possessed. Plaintiff when he demanded water had owned the land only a few months and by his own admission knew nothing of any water right when he bought it.

The defendant company, in addition to waters theretofore appropriated, diverted and applied to a beneficial

use, waters from the Benjamin Drains. It filed with the State Engineer an underground water claim to these waters showing that it had utilized them ever since 1923, and the evidence shows that ever since the drains were put in by the Benjamin Drainage District, the defendant company had diverted and used all of these drain waters during the irrigation season. It is true that the claims filed (defendants' exhibits 7-10) were not for an original appropriation but were claims to underground water by right of use prior to March 22nd, 1935, in accordance with Sec. 100-3-12 and 100-2-14, Revised Statutes of Utah, 1933, as amended by Session Laws 1935.

Underground percolating water at least up to 1935 could be appropriated without filing an application before the State Engineer, *Wrathall v. Johnson*, 86 U. 50, 40 P.2d 755. It appears that the defendant company validly appropriated such drain water. But whether this accretion is deemed an original appropriation or simply an augmentation of the supply theretofore appropriated, the fact remains that the defendant company has utilized at all times all of the low water flow of Duck Creek and is entitled to an award of that flow to the full extent of the needs of its stockholders.

This Court should not permit the rights of a prior appropriator to be cut down or frittered away. In the case of *Sharp v. Whitmore*, 51 U. 14, 168 Pac. 273, it was held that where the evidence showed that a continuous flow of five second feet could be, and for years had been, economically applied on defendant's land, the lower court erred in awarding only four cubic feet per second. In the instant case, where any amount awarded to defendant company, because of the great fluctuation and rapid falling off of the

stream, would be insufficient to provide for the land of its stockholders, the trial court's failure to fully recognize the defendant company's priority is doubly prejudicial. What justification can there be for the court to take away, or require the sharing with plaintiff of, the rights enjoyed without restriction by it and its predecessors for more than seventy years? Prior appropriation for beneficial use is the basis of acquisition of water rights under Utah Law. *Gunnison Irr. Co. v. Gunnison Highland Canal Co.*, 52 U. 347, 174 Pac. 852. The prior appropriator has a better right than any subsequent appropriator, and this proposition is so thoroughly embodied as a part of the fundamental law of this state that it is beyond question. *Brady v. McGonagle, St. Engineer*, 57 U. 424, 195 Pac. 188.

The rights of the defendant company in the waters of Duck Creek based on its appropriation more than seventy years ago, are to be determined by the quantity diverted through the years and used beneficially and economically. *Adams v. Portage Irrigation, Reservoir and Power Company*, 95 U. 1, 72 P.2d 649. Ever since before 1870, the predecessors of the Duck Creek Irrigation Company have been using the flow of Duck Creek without interference to the full extent of their needs. Except during flood water stages they have used all of such flow. The capacity of their ditches from each dam is ten second feet or a total capacity of twenty second feet (T 835-838). A practical irrigation stream is at least four second feet, according to Engineer Jacobs. Whenever there was enough water for two streams, one was taken out at the Upper Dam and one at the Duck Creek Dam by the stockholders of plaintiff and their predecessors.

The evidence shows that after June, the flow in Duck Creek for most of the time was decreasing—sometimes it almost disappeared. Yet, even though we should assume a constant flow of eight second feet during all of the irrigation season, this would be inadequate to take care of the more than four hundred acres of land of the defendant company's stockholders, based upon the fifty-acre duty found by the court.

It must be concluded that the minimum low-water use to which defendant company is entitled is eight cubic feet per second, with sufficient high water up to the twenty second feet capacity of its ditches to make up for the falling off of the stream below eight second feet during the principal part of the irrigation season, all with a priority over plaintiff's claims.

Stevens' judgment was that the available flow at the Duck Creek Dam along the first of May, would be from ten to twenty second feet and that it would go down to five second feet about the fifth of June. This would mean that if the defendant company's right to ten second feet at each dam is recognized, plaintiff would get the excess during May at the Lower Dam, together with all of the flow from the Big Spring area, which in the Summer, is about two second feet and in the Spring, much more—all this the plaintiff would have for one hundred acres of grass-land and thirty acres of cultivated land, not broken up until long after 1906. In this same connection, Howard Stevens testified that whenever they would take the water from the Duck Creek Dam, the flow was usually ten second feet or better (T 250). It must be kept in mind that this was after a stream was taken out at the Upper Dam, in which plaintiff claims no interest whatsoever.

The award of twenty second feet flow to defendant company is fully justified by the evidence; but the irreducible minimum to which it is entitled and without which its stockholders cannot maintain their farms is eight cubic feet per second with an unqualified priority, and an additional high water right in some measure to make up for the decrease of the stream well below eight second feet during most of the irrigation season, and its decrease often to a flow of between two and three second feet, as was the case when Engineer Jacobs measured it in 1945. Incidentally, at that time, as shown by Engineer Jacob's testimony, the defendant company, taking all the water at their two dams, had a total of 2.01 second feet for the use of all of its stockholders on almost five hundred acres of ground, while the plaintiff in the Big Spring area water entering below the Duck Creek Dam, had 1.13 second feet for the one hundred acres of grass-land the court found he watered from the Stevens Dam. It is obvious that without any water from the Duck Creek Dams and by using excess high water, plaintiff is in a reasonably good position for a secondary claimant and that any interference by him with the defendant company's established prior rights, such as permitted by decree in its present form, would be a grave injustice. The company should be permitted, as in the past, to use the water at both dams to the capacity of its ditches whenever the water is available and needed without any interference whatsoever from the lower claimant.

III. Because the evidence established no rights of plaintiff as against the defendant company, and because any use of water by plaintiff through or over the Duck Creek Dam has been limited to excess or unneeded quantities, and because for more than seventy years last past

the defendant company and its predecessors have never pro-rated or taken turns with the plaintiff or his predecessors, such turns being wholly unjustified and impractical, the court erred in requiring the defendant company to go on turns with the plaintiff.

We have already pointed out that there was no diversion and beneficial use of Duck Creek water on land now owned by plaintiff prior to 1903 (Stevens admitted that he, not a prior owner, put the grain land under cultivation on which the court based plaintiff's low-water right, after 1906 (T 117) and that since that time, any use by Stevens and his successors was of high or surplus waters. This would furnish no basis for putting plaintiff on turns with the defendant company, even though he had established a water right, which we deny. We call attention to the testimony on page 102 of the transcript wherein Stevens admitted that he knew they were taking water in rotation from the Duck Creek Dam when the water got low and that he never asked for a turn at any time and never made any protest that they were handling it in that way.

The court's Finding No. 40 (R 195) that the most economical use of the waters of the Benjamin Slough (Duck Creek) requires that the water be used on fifteen-day turns, and that "The custom and practice for many years last past has been for the water users to take the water in turns about fifteen days apart", is wholly unjustified by the evidence as applied to plaintiff or his predecessors as water users. That the court did so is evident from the fact that in paragraph 11 of the decree (R 207) the court orders that during the period May first to August fifteenth, the waters of Duck Creek shall be distributed between the

parties in accordance with their decreed rights on turns fifteen days apart.

The plaintiff or his predecessors were never on turns before, but took subject to the rights of the Duck Creek Irrigation Company to the full stream to the extent of their needs and particularly after May 1. There can be no justification for the court's conversion of such an excess flow right into a full flow right for any period. It is true that the stockholders of defendant company have been on turns between themselves, but the finding as to turns as between them and the plaintiff is without support in the evidence and the decree is contrary to law. Of course, the fundamental objection is that a non-existent water right in favor of plaintiff, and to the prejudice of defendant company, is further recognized by the trial court's decree respecting turns. The next objection is that it is raised by such a device from a flood-water or excess flow right beyond the capacity of defendant company's ditches to a primary right to be rotated with the company, notwithstanding the admitted priority of the latter's right. Furthermore, it gives rise to numerous problems of timing and administration which were never present before and which the plaintiff has no right to place upon the primary user; and finally, it permits plaintiff indirectly to prevent the defendant company from using its own ditches during a substantial period every fifteen days, whereas, at all times heretofore, except with its own temporary consent to help Stevens out, the company during all times has been able to use its own ditches to their full capacity whenever the water has been available.

This brings us to our final point in connection with ditch rights of way.

IV. There is no competent evidence that the predecessors in interest of plaintiff ever constructed ditches leading to plaintiff's lands from Duck Creek Dam; the evidence further shows that such old ditches as may have existed at one time were simply waste-water ditches for the benefit of higher lands. There is no evidence that plaintiff ever acquired a prescriptive right, There is affirmative evidence which shows that for the last forty years neither plaintiff nor his predecessors have used any ditches from the Duck Creek Dam except as a permissive use by express disclaimer of rights from them. Under such circumstances the court had no right to award any ditches to plaintiff in whole or in part. Moreover, the findings only purport to find that plaintiff used ditches from Duck Creek Dam for the irrigation of 68 acres of land, while the Findings and Conclusions assume to grant plaintiff the unlimited right to use such ditches, both with respect to water for such sixty-eight acres and also for the water found by the court to have been used through the Stevens Dam and not through ditches leading from the Duck Creek Dam.

It appears that the matter which really brought the present difficulty to a head was not so much a dispute over water rights (the record being replete with admissions on the part of plaintiff's predecessors that they took water only when the upper appropriators were not using it) but was over the plaintiff's claims to rights through the ditches from the Lower Dam for the use of surplus water. It is obvious that plaintiff, knowing nothing of the background of the water rights involved, has determined to develop new land by the use of at least high water through the Duck Creek Dam

diversion and he desires to obtain a right in the ditches of the stockholders of the defendant company.

There is no foundation whatsoever in the record from which it could be found that plaintiff has acquired, or has, any interest or easements in the ditches leading from the Lower Dam. He received no grant or conveyance, and as far as using the same under claim of right, or otherwise for a period of more than twenty years, continuously, one can look in vain for any evidence. In fact, any use he ever did make was purely a permissive use when the Duck Creek Irrigation Company stockholders and Payne and Lindstrom were not using them.

Some claim is suggested that the right to the ditches is owned by reason of some original use on plaintiff's land by Stewart. Stewart testified that water was taken across the flume from Big Springs and sometimes mixed with Duck Creek water and conveyed northerly to a point just west of the section line, but he specifically testified that the use of the water was on the Payne land and not on the plaintiff's land, as has been pointed out heretofore. Furthermore, the evidence shows that this ditch was not a ditch diverting from the Duck Creek Dam but was taken out of the creek below, in the vicinity of the flume. The Big Springs water for a great many years now has run into the Duck Creek channel below the Duck Creek Dam. Any use of the ditch, therefore, did not involve plaintiff's land, had a point of diversion below the Dam and long since has been abandoned.

The land owners in the Articles of Incorporation themselves granted and conveyed to the company the rights of way for ditches, while the plaintiff or his predecessors received no such grant. There is no proof that the plaintiff

or his predecessors ever used these ditches under claim of right, or ever used them for any continuous period exceeding a few days, not to mention twenty years, and it affirmatively appears that any use was purely permissive and upon express consent when the upper appropriators were not using them. As a matter of fact, we can find no indication in the record that the ditches described in the decree are even the same ditches that were used by Stevens even by permission.

The significance of this question is indicated by the fact that in order to utilize the water of the company, the stockholders must use a full irrigation stream insofar as available. Not only would the stockholders be deprived of the use of their own ditches during low water, but during high water when there is enough water for a full stream for everyone plaintiff could fill the ditches with water claimed by him and the company stockholders could not use them at all. Thus, a questionable and certainly subsequent claim of the plaintiff would be converted into an instrument to be used to fritter away the prior rights of the company and its stockholders, both to the water and in the ditches.

The court, under the record, should leave the plaintiff exactly where he was before the institution of this action with respect to the ditches; that is, with no right or easement therein and limited to such use as the company or the land owners can voluntarily permit without prejudice to their rights or which he may acquire by condemnation. He may have the right to condemn any unused capacities in a proper case if the facts justify, but this matter is not involved here. Even in the case of condemnation, rights thereby acquired could not deprive the company and its

stockholders of the use of their own ditches whenever they needed them.

Plaintiff is seeking here, without foundation, to obtain a greater right than he could secure even though he proceeded in condemnation. The court has no jurisdiction in this proceeding to give away the ditches of the company and its stockholders, much less to block the free and unhampered use of their own water through their own ditches. Plaintiff has no more right in the ditches from the Duck Creek Dam than the defendant company has in those from the Stevens Dam.

Plaintiff's counsel argued that from year to year, plaintiff or his predecessors, cleaned out the ditches from the Lower Dam. If this were so, he could not thereby acquire any right in them, for he should in all fairness, when permitted to use them, contribute to their maintenance. But the record shows this claim is altogether too broad in any event, for it was only on a few isolated occasions that plaintiff or his predecessors in interest ever helped with the ditches, and not continuously or over any period in any respect and then only to get excess water by permission of the upper users. This furnishes no foundation for a prescriptive right. *Yeager v. Woodruff*, 53 Pac. 1045, 17 U. 361.

An easement acquired by prescription is always limited by the use made during the prescriptive period. *Salisbury v. Rockport Irrigation Co.*, 79 U. 398, 7 P.2d 291. Here, we do not even have a prescriptive period or any use except a temporary permissive use, by which a right of way can be measured. When did the prescriptive period begin? What ditch was used by plaintiff's predecessors during such fanciful period? Was it the same ditch as de-

scribed in the decree in whole or in part? What use was made which would define any prescriptive right? The ditches are over the lands of other persons. How can the court give these lands, or an interest therein, to plaintiff in this action?

There are so many insurmountable difficulties preventing the award of the ditch rights to plaintiff as the lower court sought to do, that we at this time leave the matter for plaintiff's counsel to suggest, not to mention justify, any possible basis for the award mentioned.

CONCLUSION

One can search the record in vain for any semblance of justification for the award of a water right to plaintiff as against the Duck Creek Irrigation Company. On the other hand, the uncontroverted evidence shows that the defendant company's predecessors were the original appropriators and always used the flow of Duck Creek by prior right to the full capacity of their ditches whenever needed. In no way recognized by law did plaintiff or his predecessors appropriate the water which the court awarded him; there can be not even a pretense that he acquired it by virtue of adverse possession; he or his predecessors helped to build neither the Duck Creek Dams nor any of the ditches diverting water therefrom. The only suggestion of any connection with ditches leading from the Duck Creek Dam (and there is no claim of any rights on the part of plaintiff from the Upper Dam) is that of comparatively recent years when Stevens asked, and obtained, permission to do a little cleaning so that he could get excess water temporarily from the Duck Creek Dam to some of his land. He or his predecessors neither asserted a right to such ditches at the time, nor

did they later maintain any adverse claim for any period, let alone for the required twenty years of continuous use under claim of right.

Plaintiff or his predecessors were never on turns with the defendant company or its predecessors and until shortly before the commencement of this action never claimed any right to pro-rate or share by turn as against the defendant company or its predecessors.

Yet, aside from a two second foot flow awarded as a priority to the defendant company, which would not reach plaintiff's lands anyway, plaintiff, by the decree, ends up at this point with a right which in priority, time and quantity per acre of land claimed to have been irrigated by him, equals the right per acre awarded to the successors to the original appropriators—in fact, ends up with more liberal treatment; Stevens, himself, admitted that only thirty acres of plaintiff's land had been planted to crops, which was after 1906, and that he used Strawberry Reservoir water for all but the first watering on that thirty acres (T 93-95), yet the court awarded plaintiff a water right for sixty-eight acres of cultivated crops out of Duck Creek. On the other hand, the amount of cultivated acreage now under the defendant company has remained without appreciable change since before the turn of the century, well in excess of the four hundred thirty-four acres of cultivated land on the basis of which the court made its award to the defendant company.

The doctrine of the case of *Gill v. Tracy*, 13 Pac. 2d, 329, 80 U. 127, is directly applicable here. In the *Gill* case, Jensen was the lower claimant and Snyder was his predecessor. The court said (p. 332-333):

“ . . . The evidence does not show when the Snyders first went into possession, but does show they were on the place and cutting hay in the summer of 1911. Neither the Snyders nor Jensen ever made any filing with the State Engineer on the waters of Johnson Creek The appellant Jensen does not trace title to his land to anyone who appropriated water for use on that land or any other lands, nor to anyone who either appropriated or used the water of Johnson Creek on any lands. Whatever title he has to either land or water was conveyed to him by the Snyders, and while they made some use of the water of Johnson Creek on the lands conveyed, they had never made any valid appropriation. Both the Snyders and Jensens used such waters of Johnson Creek as came down to their lands after those above them on the stream, including Tracy and the Gills, were fully satisfied. Jensen, therefore, has established no right to the waters of this creek for irrigation purposes ”

Substitute the name of Stevens for Snyder, Bishop for Jensen, the date 1906 for 1911, and the term Duck Creek for Johnson Creek, and we have language almost exactly covering the instant case.

It would be strange, indeed, if the stockholders of the Duck Creek Irrigation Company, whose farms have suffered from lack of water over the years, notwithstanding their long recognized and utilized right to use the flow of Duck Creek to the full extent of their needs, should be puzzled as well as profoundly concerned. In justice to them, as well as to prevent a grossly unsound legal result, which unless corrected would stand in the minds of all acquainted with the circumstances as a reproach to the ju-

dicial process, we earnestly submit that the judgment of the trial court should be reversed.

The plaintiff did not establish by a preponderance of the evidence, nor any competent evidence, that his predecessors appropriated or that he otherwise acquired the right to the use of the waters or ditches awarded to him. The record does establish beyond question that the predecessors of the Duck Creek Irrigation Company appropriated prior to 1870 and that they, and the defendant company, ever since have used under claim of right at least eight second feet of low water through the Upper Dam and the Duck Creek Dam, together with an additional twelve second feet of the high-water flow whenever it was available and needed by them, by right prior and superior to any claims of plaintiff.

The decree should be modified to recognize and confirm these rights of the defendant company as superior and prior to any claims of plaintiff and to deny plaintiff the use of the ditches to which he has shown no valid right, with costs to defendant company.

Respectfully submitted,

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